

No. 97-1252-CFX Title: Janet Reno, Attorney General, et al., Petitioners
v.
American-Arab Anti-Discrimination Committee, et al.

Docketed: Court: United States Court of Appeals for
January 30, 1998 the Ninth Circuit

See also:
97-526

Entry Date Proceedings and Orders

Jan 30 1998 Petition for writ of certiorari filed. (Response due April 30, 1998)

Jan 30 1998 Appendix of petitioner filed.

Feb 23 1998 Order extending time to file response to petition until April 16, 1998.

Apr 13 1998 Order further extending time to file response to petition until April 30, 1998.

Apr 16 1998 Brief amici curiae of Washington Legal Foundation, et al. filed.

Apr 30 1998 Brief of respondents American-Arab Anti-Discrimination Committee, et al. in opposition filed.

May 12 1998 DISTRIBUTED. May 28, 1998

May 13 1998 Reply brief of petitioner Janet Reno, Attorney General, et al. filed.

May 27 1998 Letter from the Solicitor General received and distributed

Jun 1 1998 Petition GRANTED. limited to the following question:
"Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation."
SET FOR ARGUMENT November 4, 1998.

Jul 16 1998 Joint appendix filed.

Jul 16 1998 Brief of petitioners Janet Reno, et al. filed.

Jul 16 1998 Brief amici curiae of Washington Legal Foundation, et al. filed.

Jul 16 1998 Brief amicus curiae of Criminal Justice Legal Foundation filed.

Jul 29 1998 Order extending time to file brief of respondent on the merits until September 8, 1998.

Aug 5 1998 Record filed.

Aug 7 1998 Order further extending time to file brief of respondent on the merits until September 11, 1998.

Sep 11 1998 Brief amici curiae of American Immigration Law Foundation, et al. filed.

Sep 11 1998 Brief of respondents American-Arab Anti-Discrimination Committee, et al. filed.

Sep 11 1998 Brief amicus curiae of American Bar Association filed.

Sep 11 1998 Brief amicus curiae of Brennan Center for Justice at NYU School of Law filed.

Sep 11 1998 Brief amicus curiae of National Immigration Law Center

Entry Date

Proceedings and Orders

Sep 17 1998	filed.
Oct 14 1998	CIRCULATED.
	Reply brief of petitioners Janet Reno, Attorney General, et al. filed.
Nov 4 1998	ARGUED.

97-1252 JAN 30 1998

No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
*Assistant Attorney
General*

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
*Assistant to the Solicitor
General*

DOUGLAS N. LETTER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

36 P/2

QUESTIONS PRESENTED

This case involves a suit to enjoin deportation proceedings commenced by the Immigration and Naturalization Service against six non-resident and two permanent resident aliens. Respondents contend that they were targeted for deportation based on their association with the Popular Front for the Liberation of Palestine; that supporters of other, purportedly similar, organizations were not placed in deportation proceedings; and that the government's efforts to deport respondents constitute selective enforcement of the immigration laws in violation of their First Amendment right to freedom of association. The courts below held that respondents had demonstrated a likelihood of success on their selective enforcement claim and were therefore entitled to preliminary injunctive relief. The questions presented are as follows:

1. Whether the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.
2. Whether the courts below erred in concluding that respondents had shown a likelihood of success on their claim of selective enforcement, where the government had reason to believe that respondents had carried out fundraising activities for a foreign terrorist organization.

II

PARTIES TO THE PROCEEDINGS

The following Department of Justice officials are petitioners in this Court and were appellants in the court of appeals and defendants in the district court: Janet Reno, Attorney General; Harold Ezell; C.M. McCullough; Doris Meissner, Commissioner, Immigration and Naturalization Service (INS); Ernest E. Gustafson, personally and in his capacity as former District Director of the INS; Richard K. Rogers, District Director, personally and in his capacity as District Director of the INS; Gilbert Reeves, personally and in his capacity as an officer of the INS. The INS itself was also a defendant in the district court and an appellant in the court of appeals, and is a petitioner in this Court. The following were plaintiffs in the district court and appellees in the court of appeals, and are respondents in this Court: American-Arab Anti-Discrimination Committee; Aiad Barakat; Naim Sharif; Khader Musa Hamide; Nuangugi Julie Mungai; Ayman Mustafa Obeid; Amjad Obeid; Michel Ibrahim Shehadeh; and Bashar Amer.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	11
Conclusion	30

TABLE OF AUTHORITIES

Cases:

<i>Auguste v. Attorney General</i> , 118 F.3d 723 (11th Cir. 1997)	11, 20
<i>Azizi v. Thornburgh</i> , 908 F.2d 1130 (2d Cir. 1990) ..	29
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	26
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 (1980)	15, 19
<i>Farrakhan v. Reagan</i> , 669 F. Supp. 506 (D.D.C. 1987), aff'd mem., 851 F.2d 1500 (D.C. Cir. 1988) ...	23
<i>Fiallo v. Bell</i> , 430 U.S. 787 (1977)	28
<i>Foti v. INS</i> , 375 U.S. 217 (1963)	13
<i>Galvan v. Press</i> , 347 U.S. 522 (1954)	28
<i>Gastelum-Quinones v. Kennedy</i> , 374 U.S. 469 (1963)	28
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952)	28
<i>Healy v. James</i> , 408 U.S. 169 (1972)	7, 21
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	15
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972)	28
<i>Lalani v. Perryman</i> , 105 F.3d 334 (7th Cir. 1997) ...	16
<i>Longstaff, In re</i> , 716 F.2d 1439 (5th Cir. 1983), cert. denied, 467 U.S. 1219 (1984)	29
<i>Massieu v. Reno</i> :	
91 F.3d 416 (3d Cir. 1996)	14, 15
915 F. Supp. 681 (D.N.J. 1996)	15
<i>Mathews v. Diaz</i> , 426 U.S. 67 (1976)	27

IV

Cases—Continued:

	Page
<i>Narenji v. Civiletti</i> , 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980)	29
<i>Ramallo v. Reno</i> , 114 F.3d 1210 (D.C. Cir. 1997), petition for cert. pending, No. 97-526	11, 16, 20
<i>Regan v. Wald</i> , 468 U.S. 222 (1984)	22, 23, 26
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	28
<i>Scales v. United States</i> , 367 U.S. 203 (1961)	28
<i>Shaughnessy v. Mezei</i> , 345 U.S. 206 (1953)	28
<i>Stone v. INS</i> , 514 U.S. 386 (1995)	13, 19
<i>Teague v. Regional Comm'r of Customs</i> , 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969)	23
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	19
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	22
<i>Veterans & Reservists for Peace in Vietnam v.</i> <i>Regional Comm'r of Customs</i> , 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972)	23
<i>Walsh v. Brady</i> , 927 F.2d 1229 (D.C. Cir. 1991)	23

Constitution and statutes:

U.S. Const. Amend. I	<i>passim</i>
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214	23-24
§ 301(a)(1), 110 Stat. 1247	24
§ 301(a)(6), 110 Stat. 1247	24
§ 301(a)(7), 110 Stat. 1247	25
§ 302(a), 110 Stat. 1248	24, 26
§ 303(a), 110 Stat. 1250	24
Hobbs Act (Administrative Orders Review Act), 28 U.S.C. 2341-2351	13, 18
28 U.S.C. 2347(b)(3)	6, 7, 18, 19
28 U.S.C. 2347(c)	18
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009	9
§ 306(a), 110 Stat. 3009-607 to 3009-612	2, 9

V

Statutes—Continued:

	Page
§ 306(a)(2), 110 Stat. 3009-612	15
§ 306(c)(1), 110 Stat. 3009-612	16
§ 309(c)(1), 110 Stat. 3009-625	2
Immigration and Nationality Act, 8 U.S.C. 1101 <i>et seq.</i> :	
8 U.S.C. 1105a	13, 15
8 U.S.C. 1105a(a)	6, 13, 18
8 U.S.C. 1105a(c)	6, 13
8 U.S.C. 1182(a)(3)(B)(iii)(IV)	5
8 U.S.C. 1221-1231 (Supp. II 1996)	17, 18
8 U.S.C. 1251(a)(6)(D) (1982)	4, 5
8 U.S.C. 1251(a)(6)(F)(ii) (1982)	4
8 U.S.C. 1251(a)(6)(F)(iii) (1982)	4
8 U.S.C. 1251(a)(6)(G)(v) (1982)	4
8 U.S.C. 1251(a)(6)(H) (1982)	4
8 U.S.C. 1252(a)(1) (Supp. II 1996)	18, 19
8 U.S.C. 1252(b)(9) (Supp. II 1996)	16, 19
8 U.S.C. 1252(f) (Supp. II 1996)	9, 17
8 U.S.C. 1252(g) (Supp. II 1996)	9, 15, 16, 19, 20
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a), 100 Stat. 3394 (8 U.S.C. 1255a)	7
International Emergency Economic Powers Act, 50 U.S.C. 1701 <i>et seq.</i>	24
Miscellaneous:	
Exec. Order No. 12,947, 60 Fed. Reg. 5079-5081 (1995)	24
61 Fed. Reg. 1695 (1996)	24
62 Fed. Reg. (1997):	
p. 3439	24
p. 52,650	24
63 Fed. Reg. 3445 (1998)	24

In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General and the other federal parties, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 119 F.3d 1367. The opinions of the district court (App. 22a-43a, 44a-76a) are unreported. Earlier opinions of the court of appeals (App. 77a-128a, 166a-187a) are reported at 70 F.3d 1045 and 970 F.2d 501. One earlier opinion of the district court (App. 188a-245a) is reported at 714 F. Supp. 1060, and three others (App. 129a-137a, 138a-150a, 151a-165a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 10, 1997. A petition for rehearing was denied on December 23, 1997. App. 246a-252a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, as well as relevant provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, §§ 306(a), 309(c)(1), 110 Stat. 3009-607 to 3009-612, 3009-625, are reprinted at pages 253a-255a of the appendix to this petition.

STATEMENT

1. From its founding in 1967, the Popular Front for the Liberation of Palestine (PFLP) has proclaimed the United States to be one of its principal enemies, along with the State of Israel and the governments of various moderate Arab States. Among its many acts of international terrorism, the PFLP hijacked five aircraft in one weekend in 1970, killed 16 United States citizens at Israel's Lod Airport in 1972, assassinated the United States Ambassador to Lebanon in 1976, and conducted a campaign of attacks against moderate Palestinian officials during the mid-1980s, including assassinations. The organization strenuously opposed the United States in the Gulf War with Iraq, and underscored its opposition to the Madrid peace talks in 1991 by machine-gunning a West Bank passenger bus, injuring five children and killing their mother and the bus driver. The PFLP remains one of the rejectionist terrorist groups violently opposed to the peace process sponsored by the United States in the Middle East. C.A. E.R. 216-219, 230-241.¹

¹ Evidence introduced by the government in this case demonstrated the extensive nature of the PFLP's activities in the United States. Internal documents seized from the PFLP's U.S. leaders in 1983 and 1984 revealed that the group had established secret cells in this country, which had military capability and were awaiting orders from PFLP headquarters in Syria. The FBI also discovered that, despite its historic animus towards this country, the PFLP has developed and

2. In January 1987, the Immigration and Naturalization Service (INS) charged eight aliens in Los Angeles with deportability based on their activities on behalf of the PFLP. Those aliens are the respondents here. Two of the respondents (Khader Hamide and Michel Shehadeh) are permanent resident aliens; the other six (Aiad Barakat, Julie Mungai, Amjad Obeid, Ayman Obeid, Naim Sharif, and Bashar Amer) were in this country under temporary visas for studying or visiting.

Evidence introduced by the government in this case showed that respondent Hamide had come to the attention of the Federal Bureau of Investigation (FBI) as a result of investigative activities conducted by a task force considering possible terrorist threats to the 1984 Los Angeles Olympics. C.A. E.R. 3-6. Utilizing confidential sources, leads from other FBI offices, and covert surveillance, the FBI and INS established that Hamide was organizing fundraising events on behalf of the PFLP. *Id.* at 8-9, 22-24, 29-30. The FBI subsequently identified the other seven respondents as among those assisting in the PFLP's fundraising efforts. See *id.* at 30-39, 246-249.² Based on the information provided by the FBI, INS District

controls a substantial infrastructure in the United States. A principal activity of that infrastructure is concerted fundraising for PFLP operations abroad. C.A. E.R. 13-17, 81-93, 185-190, 212.

² FBI Special Agents who observed one such fundraising event stated that Hamide had overseen the actual collection of funds, assisted principally by respondent Shehadeh and (in varying degrees) by the other six respondents. C.A. E.R. 33-51, 246-250. Based upon his observation of the proceedings, one Special Agent concluded that "it was apparent that the money collected was collected directly for the PFLP with the intent that it would be utilized in support of the PFLP's terrorist activities." *Id.* at 50. The Special Agent interpreted the event's keynote speech as calling for the assassination of (among others) Zaphir al-Masri, the Palestinian West Bank Mayor of Nablus. *Ibid.* Al-Masri was warned of the threat but was nevertheless killed by the PFLP three weeks later. *Id.* at 44-45, 205.

Counsel Elizabeth Hacker drafted the initial deportation charges against the eight respondents. *Id.* at 251, 258-260.

3. All eight respondents were originally alleged to be deportable because of their advocacy of world communism, see 8 U.S.C. 1251(a)(6)(D), (G)(v), and (H) (1982). The six non-residents were also alleged to be deportable on the ground that they had failed to maintain student status, worked without authorization, or overstayed a visit. See App. 79a-81a. In April 1987, respondents filed suit in federal district court, seeking to have the pending deportation proceedings enjoined. They argued that the provisions basing deportability on advocacy of world communism violated the First Amendment. They also contended that they were the victims of impermissible selective enforcement based on their association with the PFLP. See App. 169a-170a.

Later that month, the INS withdrew the advocacy-of-communism charges against all eight respondents, leaving only the visa violation charges pending against the six non-residents. App. 169a. The INS amended the charges against respondents Hamide and Shehadeh (the permanent resident aliens), alleging that they were deportable under 8 U.S.C. 1251(a)(6)(F)(iii) (1982) because of their meaningful membership in an organization that advocates destruction of property. See App. 81a, 169a. The INS subsequently added a charge that Hamide and Shehadeh were deportable under 8 U.S.C. 1251(a)(6)(F)(ii) (1982) because of their membership in an organization that advocates the unlawful assaulting or killing of government officers. App. 81a. Following amendment of the relevant statutory provisions in 1990, Hamide and Shehadeh were also charged with having engaged in terrorist activities, defined by the Act to include "[t]he soliciting of funds or other things of value

for terrorist activity or for any terrorist organization." 8 U.S.C. 1182(a)(3)(B)(iii)(IV). See App. 4a.³

4. On January 7, 1994, the district court preliminarily enjoined the INS from conducting further deportation proceedings against the six non-resident aliens charged with visa violations. App. 138a-150a. For purposes of determining whether prohibited selective enforcement had occurred, the court stated, "the appropriate control group for [respondents] is: 'individuals whom the government knows to be in violation of non-ideological provisions and who associate with terrorist organizations whose views the government endorses or tolerates.'" App. 141a. The court authorized respondents to conduct further discovery bearing on the question whether individuals within that control group had been placed in deportation proceedings, App. 143a-147a, and it entered a preliminary injunction in respondents' favor, App. 148a-150a. The court concluded, however, that it lacked jurisdiction to consider the selective enforcement claim advanced by respondents Hamide and Shehadeh, and therefore granted summary judgment to the government on that claim. App. 129a-137a.

5. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. App. 77a-128a (*AADC II*). At the time of the court's decision in *AADC II*, the Immigration and Nationality Act (INA) provided that "[t]he procedure prescribed by, and all the provisions

³ Although the original charges based on Section 1251(a)(6)(D) had been dropped in 1987, respondents nevertheless pursued their First Amendment challenge to that provision. In 1989 the district court held the provision to be unconstitutional. App. 188a-245a. The court of appeals reversed, see App. 166a-187a (*AADC I*), holding that the challenge to Section 1251(a)(6)(D) was unripe. The court noted, *inter alia*, that respondents "are not now charged under the challenged provisions," and that "if charged and found deportable for violation of the challenged provisions, the [respondents] will have the opportunity to present their constitutional challenges to a court." App. 185a.

of chapter 158 of title 28 [the Hobbs Administrative Orders Review Act], shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation," 8 U.S.C. 1105a(a). The INA also stated that "[a]n order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right." 8 U.S.C. 1105a(c). The Hobbs Act establishes procedures for direct review of agency actions in the court of appeals. It provides, *inter alia*, that the reviewing court may transfer a case to a district court for resolution of ancillary factual issues. 28 U.S.C. 2347(b)(3).

Notwithstanding the INA's provisions for exclusive judicial review in the courts of appeals, the court of appeals concluded that the district court could entertain respondents' selective enforcement challenges and could do so despite the absence of a final order of deportation. The court concluded that because neither the immigration judge nor the Board of Immigration Appeals was authorized to consider a claim of selective enforcement, "selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order." App. 87a. The court also stated that adjudication of a selective enforcement claim would require a factual inquiry that could not be conducted by a court of appeals on review of a final deportation order. The court concluded, in that regard, that a court of appeals in reviewing a final order of deportation would not be authorized to transfer a case to a district court for resolution of pertinent factual issues pursuant to 28 U.S.C. 2347(b)(3). App. 90a-91a; see p. 6, *supra*. The court also held that the district court had erred in declining to exercise jurisdiction over the selective enforcement claims advanced by respondents Hamide and Shehadeh. App. 95a-97a.

The court of appeals then concluded that the six non-residents had established a likelihood of success on their selective-enforcement challenges to the institution of deportation proceedings. The court upheld as not clearly erroneous the district court's selection of a "control group" comprised of "aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates." App. 106a. The court indicated that in its view, a citizen's association with a disfavored group—even one that engages in unlawful acts—may be punished only if the government can "establish a 'knowing affiliation' and a 'specific intent to further [the group's] illegal aims.'" App. 108a (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

The court also rejected the contention that the government's conduct of deportation proceedings against aliens should be subject to less stringent constitutional scrutiny than is its regulation of citizens, concluding that "constitutionally protected activities that the Government cannot punish by means of a criminal statute are likewise beyond its reach in a deportation proceeding." App. 112a-113a. It held that respondents "ha[d] provided evidence of disparate impact and of impermissibly motivated enforcement of the immigration laws," and on that basis it affirmed the preliminary injunction entered by the district court. App. 116a.⁴

⁴ The court of appeals also held that the INS could not consider classified information in ruling on applications for legalization—*i.e.*, adjustment to temporary resident status—filed by respondents Barakat and Sharif pursuant to the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 201(a), 100 Stat. 3394 (8 U.S.C. 1255a). App. 116a-127a. We are informed that, following that ruling, respondents Barakat and Sharif were granted legalization. Those respondents consequently are no longer subject to deportation based on the original visa violations.

6. Following the court of appeals' ruling, the government introduced extensive evidence in the district court detailing respondents' activities on behalf of the PFLP, as well as the circumstances leading up to the filing of the deportation charges. That evidence demonstrated, *inter alia*, that the responsible INS official had drafted the initial charges based on the FBI's determination that respondents were engaged in PFLP fundraising activities. See p. 3, *supra*. Despite the newly proffered evidence, the district court denied the government's motion to dissolve the existing injunction against the deportation of the six non-resident respondents and issued a preliminary injunction against the deportation proceedings involving respondents Hamide and Shehadeh. App. 44a-76a.

Relying on the court of appeals' decision on the prior appeal, the district court stated that "the government must show that [respondents] had the specific intent to further the PFLP's unlawful aims" in order to defeat respondents' selective enforcement challenge. App. 49a. The court concluded that the government had failed to carry that burden. It found that the evidence underlying the investigative materials presented to District Counsel Hacker before she made her initial charging decision contained considerable hearsay and possible translation errors. App. 57a. It also held that the evidence, even if taken as true, would not establish that respondents acted with a specific intent to further the PFLP's unlawful activities, because none of the statements made at the fundraising events referred unambiguously to terrorist acts. App. 63a-64a. Because the PFLP engages in both lawful and unlawful activities, the court reasoned, evidence of respondents' participation in PFLP fundraising efforts was insufficient to demonstrate such intent. App. 64a-65a. The court also suggested that the government should have "follow[ed] the trail of the money" in order to

determine whether funds raised by respondents were actually used to support terrorist activities. App. 68a.

7. The government appealed the district court's ruling. While that appeal was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009. See App. 253a-255a. As amended by Section 306(a) of IIRIRA, 8 U.S.C. 1252(g) (Supp. II 1996) states that "[e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." 110 Stat. 3009-612. The government moved in the district court for dismissal of respondents' suit and for vacatur of the existing injunction, arguing that Section 1252(g) barred the district court from exercising jurisdiction over respondents' challenge to the Attorney General's decision to commence proceedings against them. The court denied that motion, concluding that Section 1252(g) "does not reach the constitutional claims at issue in this case." App. 42a-43a.

8. The court of appeals affirmed both the jurisdictional and merits rulings of the district court. App. 1a-21a (AADC III).

a. The court held that IIRIRA did not bar the district court from exercising jurisdiction over respondents' claims. The court relied on 8 U.S.C. 1252(f) (Supp. II 1996) (as amended by IIRIRA § 306(a)), which is entitled "Limit on injunctive relief" and provides that no lower court has jurisdiction to enjoin the operation of the relevant statutory provisions "other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." See

App. 9a-10a. While acknowledging that the new Section 1252(g) applied to the instant case, App. 7a-8a, the court stated that IIRIRA "would present serious constitutional problems" if it were construed to bar district court jurisdiction over respondents' suit, App. 12a. It believed that the availability of other avenues of review was uncertain, see App. 12a-15a, and that in any event "*prompt* judicial review of [respondents'] claims was required because violation of [respondents'] First Amendment interests would amount to irreparable injury," App. 15a.

b. The court of appeals affirmed the district court's decision not to vacate the preliminary injunction entered in favor of the six non-resident respondents. App. 17a. The court reasoned that, at the time that injunction was initially entered, the government had elected not to introduce available evidence regarding respondents' fundraising activities, and that the government's subsequent decision to supplement the record provided no basis for vacatur of the injunction. *Ibid.*

c. The court of appeals also affirmed the district court's entry of a preliminary injunction in favor of respondents Hamide and Shehadeh. The court stated that "the central issue is whether the government impermissibly targeted [respondents] due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property," App. 20a-21a, and that "[t]he record contains evidence of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property," App. 19a. The court construed its decision on the prior appeal as "ma[king] it clear that targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had

the specific intent to pursue illegal group goals." App. 20a. The court also stated that "the government has not challenged the factual finding made by the district court that the INS targeted [respondents] for their mere association with the PELP," and that respondents had therefore made a sufficient showing of improper motive irrespective of their participation in fundraising activities. App. 21a.

9. The court of appeals denied the government's petition for rehearing with suggestion of rehearing en banc, with three judges dissenting. App. 246a-252a. The dissenting judges concluded that IIRIRA unambiguously forecloses all judicial review until the entry of a final order of deportation; that the Act, so construed, creates no genuine constitutional difficulty; and that the panel's ruling is "in tension with the two other circuits which have addressed IIRIRA's jurisdiction-stripping provisions," App. 247a-248a (citing *Auguste v. Attorney General*, 118 F.3d 723 (11th Cir. 1997), and *Ramallo v. Reno*, 114 F.3d 1210 (D.C. Cir. 1997), petition for cert. pending, No. 97-526).

REASONS FOR GRANTING THE PETITION

More than ten years after the deportation charges in this case were filed, respondents' collateral challenge to the filing of those charges remains pending. Over the course of the litigation, the courts below have flouted clear statutory limitations on their own jurisdiction, and have imposed wholly unwarranted constraints on the Executive Branch's enforcement of the immigration laws.

The courts below erred, to begin with, by permitting this suit to go forward at all. It has long been an integral feature of the Immigration and Nationality Act (INA) that judicial review of deportation proceedings is available only upon the entry of a final order of deportation, and only through the review procedures established by the Act

itself. Congress has recently amended the Act in an effort to eliminate any possible uncertainty regarding that fundamental principle. Both in *AADC II* and *AADC III*, however, the court of appeals disregarded clear jurisdictional limitations and permitted this disruptive litigation to continue. Other courts of appeals, by contrast, have recognized the impropriety of such district court challenges to deportation proceedings.

The disruption of INS enforcement efforts has been exacerbated by the court of appeals' erroneous rulings on the merits of respondents' suit. The responsible INS official drafted the initial deportation charges based on the FBI's determination that respondents were engaged in fundraising activities for a foreign terrorist organization. The court of appeals held, however, that the First Amendment precluded the INS from considering respondents' involvement in those activities in determining how its enforcement discretion would be exercised. The court's remarkable constitutional analysis invites disruptive challenges to the Executive Branch's enforcement of the immigration laws, and to its efforts to remove from the United States aliens who provide material support to terrorist organizations.

Finally, the pernicious effects of the court's decision extend far beyond the sphere of immigration. The court of appeals has held, as a matter of constitutional law, that respondents cannot be "targeted" for deportation based on their PFLP fundraising activities unless (1) they can be shown to have acted with "specific intent" to further the PFLP's unlawful aims, and (2) the government can demonstrate that it has exercised its enforcement discretion in a like fashion with regard to supporters of ostensibly similar organizations. Taken to its logical conclusion, the court's holding would foreclose the imposition of *any* adverse consequence for PFLP fundraising activities where

the specified criteria have not been met. The court's decision thus casts doubt upon the constitutionality of existing statutes and Executive Orders prohibiting U.S. residents—citizens and aliens alike—from furnishing material support to specified hostile governments or foreign terrorist organizations. Review by this Court is warranted to prevent further interference both with the political Branches' enforcement of the immigration laws and with their protection of the national security.

I. A. Before the enactment of IIRIRA, judicial review of final orders of deportation was governed by 8 U.S.C. 1105a. Section 1105a generally provided that review in the courts of appeals pursuant to the Hobbs Act (28 U.S.C. 2341-2351) "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation." 8 U.S.C. 1105a(a). The Act also provided that "[a]n order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right." 8 U.S.C. 1105a(c). "The fundamental purpose behind [Section 1105a(a)] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Foti v. INS*, 375 U.S. 217, 224 (1963); accord *Stone v. INS*, 514 U.S. 386, 399 (1995).

Section 1105a defined the procedures to be employed in reviewing a final order of deportation and required exhaustion of administrative remedies before a challenge to a deportation order could be brought. It did not, in so many words, bar judicial review between the filing of an order to show cause by the INS and the entry of a non-final order of deportation by an immigration judge (IJ). It was generally recognized, however, that an alien could not evade the requirements of Section 1105a by filing suit before the

administrative proceedings had concluded. See, e.g., *Massieu v. Reno*, 91 F.3d 416, 421 (3d Cir. 1996) (stating, prior to IIRIRA, that "even where an alien is attempting to prevent an exclusion or deportation proceeding from taking place in the first instance and is thus not, strictly speaking, attacking a final order of deportation or exclusion it is well settled that judicial review is precluded if the alien has failed to avail himself of all administrative remedies, one of which is the deportation or exclusion hearing itself") (internal quotation marks omitted).

In *AADC II*, the court of appeals nevertheless concluded that it had jurisdiction to consider respondents' selective enforcement claim. The court explained:

Both the LJ conducting the deportation proceeding and the Government agree that neither the LJ nor the BIA has jurisdiction to consider a selective enforcement claim during a deportation proceeding. Thus, we conclude that selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order.

App. 87a. That analysis squarely conflicts with the Third Circuit's decision in *Massieu*. The court in *Massieu* held that the plaintiff was not entitled to immediate judicial review of his constitutional challenge to the statutory provision under which he was alleged to be deportable. The court acknowledged that the constitutional claim could not be considered during the administrative proceedings, but nevertheless construed the statutory scheme as deferring judicial review until the entry of a final order of deportation:

[T]here is no doubt that plaintiff's claims can be afforded meaningful judicial review in this court after exhaustion. Although the immigration judge is not au-

thorized to consider the constitutionality of the statute, this court can hear that challenge upon completion of the administrative proceedings * * *. Although plaintiff would prefer to have his claim heard by this court now rather than after the conclusion of the administrative process, we cannot upset the scheme created by Congress to provide plaintiff with a faster decision.

91 F.3d at 424. See *INS v. Chadha*, 462 U.S. 919, 938 (1983) (entertaining constitutional challenge under 8 U.S.C. 1105a, explaining that Section 1105a(a) "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the [deportation] hearing"). Significantly, moreover, the Third Circuit in *Massieu* ordered dismissal of the alien's entire complaint, which included a claim of selective enforcement in retaliation for his exercise of First Amendment rights. See 91 F.3d at 418, 426; *Massieu v. Reno*, 915 F. Supp. 681, 689 (D.N. J. 1996).⁵

B. IIRIRA was enacted to strengthen and make explicit the limitations on judicial review under the INA. As amended by Section 306(a)(2) of IIRIRA, 110 Stat. 3009-612, 8 U.S.C. 1252(g) (Supp. II 1996) provides:

⁵ The court's jurisdictional analysis in *AADC II* was also inconsistent with generally applicable background principles of administrative law. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-245 (1980) (holding that an agency's issuance of an administrative complaint is not "final agency action" subject to judicial review under the Administrative Procedure Act). The Court reached that conclusion despite its evident assumption that the propriety of the initial charging decision would not be subject to further administrative review. *Id.* at 243. The Court also rejected the plaintiff's contention that it would suffer irreparable harm if judicial review were deferred, explaining that "the expense and annoyance of litigation is part of the social burden of living under government." *Id.* at 244 (internal quotation marks omitted).

Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

Section 306(c)(1) of IIRIRA provides that the new Section 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." 110 Stat. 3009-612. The court in *AADC III* correctly held that the new Section 1252(g) applies to cases, like the instant suit, that were pending on IIRIRA's effective date. App. 7a-8a; accord *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), petition for cert. pending, No. 97-526; *Lalani v. Perryman*, 105 F.3d 334, 336 (7th Cir. 1997).

As we explain above, there was no statutory basis for respondents' suit even before IIRIRA was enacted. Section 1252(g) is therefore properly understood not as an attempt to divest the federal courts of jurisdiction they previously possessed, but as an effort to make absolutely clear what should have been apparent all along: that review of the INS's conduct of deportation proceedings is available *only* under the INA provisions specifically provided for that purpose. Both before and after passage of IIRIRA, the relevant statutory provisions have required the entry of a final order of deportation as an absolute prerequisite to judicial review of the deportation process.⁶

⁶ Thus, in addition to Section 1252(g), 8 U.S.C. 1252(b)(9) (Supp. II 1996) provides that "[j]udicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to

C. The court of appeals in *AADC III* offered three basic justifications for permitting respondents' suit to go forward. Those justifications are without merit.

1. The court of appeals relied in part on 8 U.S.C. 1252(f) (Supp. II 1996), which provides that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [8 U.S.C. 1221-1231 (Supp. II 1996), as amended by IIRIRA] other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." The court of appeals concluded that "[b]ecause this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the [respondents'] claims." App. 10a.

The plain text of Section 1252(f) will not support that reading. Section 1252(f) is entitled "Limit on injunctive relief" and is by its terms a *restriction* on the reviewing court's remedial authority rather than an affirmative grant of jurisdiction. See App. 249a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc). That Section makes clear, most obviously, that a court may not under any circumstances grant classwide injunctive relief against the operation of any provision contained in Sections 1221-1231. But nothing in Section 1252(f) empowers a federal court to adjudicate a suit that does not fall under some independent grant of jurisdictional authority.

2. The court of appeals also believed that respondents would be unable to obtain effective judicial review of their selective enforcement claims upon entry of a final order of deportation. The court explained that "a selective enforcement claim is not purely legal but rather requires factual proof," and that "the factual record necessary to the ad-

remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section."

judication of such a claim would not be available to a federal court reviewing a final deportation order." App. 12a. We disagree.

Both before and after the enactment of IIRIRA, judicial review of a final order of deportation has been governed by the provisions of the Hobbs Act, 28 U.S.C. 2341-2351. See 8 U.S.C. 1105a(a); 8 U.S.C. 1252(a)(1) (Supp. II 1996). The Hobbs Act specifically provides that the reviewing court of appeals may transfer a case to a district court for the resolution of pertinent issues of material fact that were not resolved (and were not required to be resolved) by the agency itself. 28 U.S.C. 2347(b)(3). If disposition of a selective enforcement claim requires resolution of factual issues not addressed in the administrative record, transfer pursuant to Section 2347(b)(3) would facilitate resolution of those issues while respecting Congress's unambiguous determination that judicial review of deportation proceedings should await the entry of a final order.

Although the court of appeals concluded that transfer to a district court under Section 2347(b)(3) would not be available in a deportation case (see App. 12a-14a), nothing in the text of either the Hobbs Act or the INA supports that result. Indeed, as amended by IIRIRA, the INA specifically prohibits the reviewing court from invoking another provision of the Hobbs Act that allows for an alternative means of resolving disputed factual issues, namely by remanding the case to the agency under 28 U.S.C. 2347(c). See 8 U.S.C. 1252(a) (1) (Supp. II 1996). That specific bar to the use of one Hobbs Act mechanism in immigration cases confirms that Congress did not intend to bar a transfer to the district court under Section 2347(b)(3). What is entirely clear, moreover, is that Congress intended to foreclose *all* judicial review of deportation proceedings until the entry of a final order of deportation. That was an integral feature of the pre-IIRIRA regime,

see pp. 13-15, *supra*, and it has been made explicit in new Sections 1252(g) and 1252(b)(9) (discussed in note 6, *supra*). Consistent with that manifest congressional intent, and because "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *Stone*, 514 U.S. at 400, the INA's judicial review provisions must be construed not to countenance respondents' now ten-year-old challenge to the mere institution of deportation proceedings.

3. The court of appeals also concluded that any judicial review that might be available following the entry of a final order of deportation "would not provide a sufficient avenue for review of the [respondents'] claims in this case." App. 14a. Relying on its decision in *AADC II*, the court asserted that "*prompt* judicial review of the [respondents'] claims [i]s required because violation of [respondents'] First Amendment interests would amount to irreparable injury that cannot be vindicated by post-deprivation remedies." App. 15a (internal quotation marks omitted). That reasoning is erroneous.

The court of appeals failed to explain how deferral of respondents' selective enforcement claims until the completion of administrative proceedings could effect an impermissible impairment of their First Amendment rights. Any burden or expense that the administrative process itself may entail does not constitute irreparable harm. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980); see also *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 264-270 (1982) (per curiam) (claim of prosecutorial vindictiveness is not subject to interlocutory appeal because the right not to be subject to vindictive prosecution may be adequately protected by review of a final judgment of conviction). Nor is there any reason to suppose that respondents' exercise of First Amendment rights would be significantly "chilled" by the pendency of deportation pro-

ceedings. Respondents' continued association with the PFLP during the pendency of the deportation process could not reasonably be expected to affect the ultimate disposition of the already pending deportation charges or their selective enforcement challenge to those charges.⁷ Denial of immediate judicial review therefore will not subject respondents to any substantial harm. In any event, any harm that respondents may suffer is greatly outweighed by the paramount interest in the expeditious removal of deportable aliens.

D. The court of appeals' jurisdictional ruling warrants review by this Court. That ruling squarely conflicts with the Third Circuit's decision in *Massieu*, which ordered the dismissal of a constitutionally based district court challenge to deportation proceedings, specifically including a First Amendment selective enforcement claim. Moreover, other courts of appeals, in contrast to the decision below, have applied Section 1252(g), as added by IIRIRA, according to its terms and ordered dismissal of constitutional challenges in district court to deportation decisions. See *Ramallo*, *supra*, and *Auguste*, *supra*. The proper application of Section 1252(g) is an issue of recurring importance, as evidenced not only by the certiorari petitions in this case and *Ramallo*, but also by a third case pending before the Court in which the same jurisdictional issue is raised in our response (at 14-17) to the certiorari petition. See *Igbonwa v. United States*, No. 97-6518.

II. The court of appeals also concluded that respondents had established a substantial likelihood of success on the merits of their suit. That holding rests on the court's

⁷ Federal law now prohibits citizens and aliens alike from contributing material support to the PFLP, see pp. 23-24, *infra*; the pendency of deportation proceedings is unlikely to create a meaningful additional disincentive to respondents' continued participation specifically in PFLP fundraising activities.

determinations that: (1) a United States citizen could not constitutionally be "targeted" for raising funds for a foreign terrorist organization unless he acted with specific intent to further the group's unlawful aims; (2) the First Amendment prohibits the United States Government from drawing distinctions among foreign organizations that advocate violence or destruction of property; and (3) any expressive or associational activity that would be constitutionally protected if engaged in by a U.S. citizen may not be considered by the INS in exercising its enforcement discretion with respect to the deportation of aliens. Those holdings cannot be reconciled with this Court's precedents, and they place unacceptable constraints on the ability of the political Branches to protect the national security, conduct foreign policy, and enforce the immigration laws.

A. In *AADC III*, the court of appeals stated that under the First Amendment, "targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals." App. 20a; see also App. 108a (*AADC II*). That assertion is erroneous.⁸ The provision of material support to foreign terrorist organizations may constitutionally be subject to a blanket prohibition, regardless of the intent of the donor or fundraiser.

⁸ The court of appeals in *AADC II* drew the "specific intent" requirement from this Court's decision in *Healy v. James*, 408 U.S. 169, 186 (1972). See App. 108a. In *Healy*, a university president denied recognition to a group of students who attempted to establish a local chapter of the Students for a Democratic Society (SDS). Although the students wished to use the SDS name, they stated that their group would not be affiliated with, and would remain completely independent of, the national organization. See *id.* at 172, 173 & n.3, 178, 186-187. *Healy* involved (at most) students' mere "association with an unpopular [domestic] organization." *Id.* at 186. The present case, by contrast, involves the provision of material support to a foreign terrorist organization.

To begin with, the extent to which the First Amendment is even implicated by the provision of material support to a foreign organization engaged in terrorist acts is uncertain at best. Even assuming that the First Amendment is implicated, however, the government's obvious and substantial interest in preventing the acquisition of material resources by foreign terrorists—an interest unrelated to the suppression of speech—plainly justifies any incidental burden on association that a prohibition on fundraising might entail. Cf. *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (“when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms”).

That point is made clear by *Regan v. Wald*, 468 U.S. 222 (1984), in which the Court upheld a Treasury Department regulation prohibiting any transaction involving property belonging to the government of Cuba or any Cuban national. See *id.* at 224. The plaintiffs in that case contended that the regulation unconstitutionally impaired their ability to travel. The Court acknowledged that the regulation “ha[d] the practical effect of preventing travel to Cuba by most American citizens,” and that the Constitution in some measure protected such travel, but concluded that the ban was “justified by weighty concerns of foreign policy.” *Id.* at 242.

The Court explained that “there [wa]s an adequate basis under the Due Process Clause of the Fifth Amendment to sustain the President’s decision to curtail the flow of hard currency to Cuba—currency that could then be used in support of Cuban adventurism—by restricting travel.” 468 U.S. at 243.⁹ The Court observed that “[m]atters

⁹ The regulatory ban upheld in *Regan v. Wald* was not directed at donations of money or property to Cuba or Cuban nationals, but

relating to the conduct of foreign relations are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” *Id.* at 242 (ellipsis and internal quotation marks omitted). The courts of appeals have consistently recognized that the substantial public and governmental interest in preventing the flow of currency to hostile nations is sufficient to justify the incidental burdens on expressive and associational activities that may result from a ban on travel or financial transactions.¹⁰

Congress has recognized that transfers of funds to foreign terrorist organizations, like transfers to hostile governments, may pose serious threats to U.S. national security and foreign policy interests. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L.

applied to all commercial transactions. Because a purchaser of goods or services is typically indifferent as to the ultimate disposition of the funds once they have reached the seller, a requirement of specific intent to further particular aims of the Cuban government would have rendered that regulatory ban a practical nullity.

¹⁰ See *Walsh v. Brady*, 927 F.2d 1229, 1235 (D.C. Cir. 1991) (“There is plenty of support for the Secretary [of State]’s argument that the interest in denying hard currency to embargoed countries such as Cuba is ‘important’ and ‘substantial’”; ban on payments upheld despite district court finding that ban would impair plaintiff’s ability to obtain posters from Cuba); *Veterans & Reservists for Peace in Vietnam v. Regional Comm’r of Customs*, 459 F.2d 676, 682 (3d Cir.) (“the Government has a compelling interest in regulating the flow of money to certain countries”), cert. denied, 409 U.S. 933 (1972); *Teague v. Regional Comm’r of Customs*, 404 F.2d 441, 445 (2d Cir. 1968) (regulations “designed to limit the flow of currency to specified hostile nations [—] mainland China, North Korea, and North Vietnam [—] * * * contribute to the furtherance of a vital interest of the government”), cert. denied, 394 U.S. 977 (1969). See also *Farrakhan v. Reagan*, 669 F. Supp. 506, 512 (D.D.C. 1987) (“In the face of the national security interests lying behind [an Executive Order barring transactions with Libya], * * * there is no alternative that would allow organizations to speak through contributions while still allowing the government to effectuate its legitimate and compelling interests in national security.”), aff’d mem., 851 F.2d 1500 (D.C. Cir. 1988).

No. 104-132, authorizes the Secretary of State to designate "foreign terrorist organization[s]." § 302(a), 110 Stat. 1248. The Act prescribes criminal penalties for any person within the United States or under the jurisdiction thereof who "knowingly provides material support or resources" to any organization so designated, and authorizes the Attorney General to seek injunctive relief to prevent violations. See § 303(a), 110 Stat. 1250. See also § 301(a)(1) and (a)(6), 110 Stat. 1247 (congressional findings that "international terrorism is a serious and deadly problem that threatens the vital interests of the United States," and that "some foreign terrorist organizations, acting through affiliated groups or individuals, raise significant funds within the United States"). Pursuant to the Act, the Secretary of State has designated the PFLP (along with 29 other groups) as a foreign terrorist organization. 62 Fed. Reg. 52,650 (1997).¹¹

Taken to its logical conclusion, the court of appeals' decision suggests that PFLP fundraisers may not be subjected to *any* adverse consequence absent a showing of specific intent to further the PFLP's unlawful aims. That requirement would substantially impair the government's efforts to enforce the AEDPA's prohibition on the provision of material assistance to foreign terrorist organizations, and it is directly contrary to the congressional

¹¹ Even before the passage of the AEDPA, financial transactions between United States residents and the PFLP (and several other Middle Eastern terrorist organizations) had been prohibited by Executive Order. Executive Order 12,947 was issued on January 23, 1995, pursuant to, *inter alia*, the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* 60 Fed. Reg. 5079; see also 61 Fed. Reg. 1695 (1996) (continuing prohibition in effect); 62 Fed. Reg. 3439 (1997) (same); 63 Fed. Reg. 3445 (1998) (same). The Executive Order rests on a presidential finding that "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States." 60 Fed. Reg. 5079.

finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." AEDPA § 301(a)(7), 110 Stat. 1247.¹² The implications of the court of appeals' First Amendment analysis thus extend well beyond the context of deportation. Review by this Court is warranted to ensure that the court of appeals' aberrant constitutional holding does not impair the government's vigorous defense of the United States' national security and foreign policy interests.

B. In concluding that respondents were likely to succeed on their selective enforcement claims, the court of appeals in *AADC III* attached significance to the fact that "members of numerous other organizations advocating violence and the destruction of property were not deported." App. 18a; see also App. 15a n.5, 18a-19a. In *AADC II* the court sustained, as not clearly erroneous, the district court's selection of a "control group" comprised of "aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates." App. 106a. The thrust of the court's analysis was that the First Amendment would preclude the government from subjecting respondents to less favorable treatment than it accords to supporters of organizations within the control group.

¹² The specific intent of the fundraiser is obviously irrelevant to the harms posed by transfers of money to foreign terrorist organizations. Regardless of the fundraiser's intent, the organization remains free to use the money for violent purposes, including terrorist attacks against Americans. And "[e]ven if money contributed through fund raising activities is actually used for medical or other benign purposes, this frees up funds from other sources for use in supporting violent activities." C.A. E.R. 221 (declaration of Ambassador Philip Wilcox, Jr., then head of the State Department counter-terrorism office).

The comparative analysis in which the court of appeals engaged is wholly inconsistent with the proper role of the Judicial Branch. This Court has frequently emphasized the impropriety of judicial intrusion into the political Branches' conduct of foreign affairs. See, e.g., *Regan*, 468 U.S. at 242 ("[m]atters relating to the conduct of foreign relations are so exclusively entrusted to the political branches as to be largely immune from judicial inquiry or interference") (ellipsis and internal quotation marks omitted); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("resolution of [foreign relations] issues frequently turn[s] on standards that defy judicial application, or involve[s] the exercise of a discretion demonstrably committed to the executive or legislature"). Just as "recognition of foreign governments * * * defies judicial treatment," *id.* at 212, no judicially manageable standards exist for determining whether other violent foreign organizations are "similarly situated" (App. 15a, 106a) to the PFLP.

In deciding whether various "foreign-dominated organizations advocating violence and destruction of property" (App. 21a) should be treated as terrorists, as freedom fighters, or as something in between, responsible officials in the political Branches must make nuanced assessments of a variety of moral, practical, and political considerations.¹³ Those choices cannot be shirked by resort to a rule that all such groups must receive equivalent treatment from the United States Government. No principle of constitutional law supports the remarkable proposition that a violent foreign organization's hostility to U.S.

¹³ In designating "foreign terrorist organizations" pursuant to the AEDPA, the Secretary of State is required to determine, *inter alia*, whether "the terrorist activity of the organization threatens the security of United States nationals or the national security of the United States." AEDPA § 302(a), 110 Stat. 1248. The Act thus presupposes that the Secretary will distinguish among violent foreign organizations based on her assessment of relevant policy concerns.

interests may not be taken into account in determining whether U.S. residents will be permitted to furnish it with material support. The court of appeals' determination that such distinctions violate the First Amendment substantially and unjustifiably interferes with the political Branches' ability to protect the national security and to conduct the Nation's foreign policy.

C. For the foregoing reasons, a United States citizen has no First Amendment right to undertake the fundraising activities in which respondents were believed to have engaged. *A fortiori*, there can be no constitutional bar to the INS's consideration of such activities in determining how its enforcement discretion will be exercised. But even if respondents had restricted themselves to forms of advocacy that would be constitutionally protected if engaged in by a citizen, their constitutionally based selective enforcement claim must fail. Because decisions regarding an alien's right to enter and to remain in this country are substantially entrusted to the political Branches, the court of appeals in *AADC II* erred in concluding that the constitutional principles applicable to citizens must apply in their entirety to the determination of which aliens will be deported.

In *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) (footnotes omitted), this Court explained:

For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to

the Judiciary. * * * Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization.

Accord, e.g., *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government."); *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953) (this Court's decisions "have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control"); *Reno v. Flores*, 507 U.S. 292, 305-306 (1993); *Fiallo v. Bell*, 430 U.S. 787, 794-795 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-767 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-590 (1952).

This Court has, in particular, permitted the deportation of aliens shown to have engaged in meaningful associational activities with foreign-dominated subversive groups. See, e.g., *Galvan*, 347 U.S. at 528 ("support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation"); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 472 n.2 (1963) (under *Galvan*, "the absence of personal advocacy of violent overthrow is not by itself a bar to deportability"); see also *Scales v. United States*, 367 U.S. 203, 222 (1961) (observing that a statutory provision requiring deportation of alien members of the Communist Party, "which rested on Congress' far more plenary power over aliens, * * * did not press nearly so closely on the limits of constitutionality" as a similarly worded criminal

provision). The court of appeals' holding that respondents may not be subject to deportation proceedings absent a showing of specific intent to further the PFLP's unlawful aims cannot be reconciled with those decisions.

The courts of appeals likewise have recognized that the constitutional constraints that govern other congressional action cannot be mechanically applied to immigration decisions. The Fifth Circuit has stated that "[t]he constraints of rationality imposed by the constitutional requirement of substantive due process and of nondiscrimination exacted by the equal protection component of the due process clause do not limit the federal government's power to regulate either immigration or naturalization." *In re Longstaff*, 716 F.2d 1439, 1442-1443 (1983) (footnote omitted), cert. denied, 467 U.S. 1219 (1984). The Second Circuit has held that immigration legislation is reviewable only under a rational-basis standard even where it impinges upon a fundamental right. See *Azizi v. Thornburgh*, 908 F.2d 1130, 1133 (1990). And the D.C. Circuit has upheld a regulation, promulgated by the Attorney General at the President's direction, that imposed upon Iranian nationals special reporting requirements designed to verify their compliance with immigration laws. See *Narenji v. Civiletti*, 617 F.2d 745, 747 (1979) (holding that "[d]istinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive," and "[s]o long as such distinctions are not wholly irrational they must be sustained"), cert. denied, 446 U.S. 957 (1982). Those decisions cannot be reconciled with the *AADC II* court's determination that "constitutionally protected activities that the Government cannot punish by means of a criminal statute are likewise beyond its reach in a deportation proceeding." App. 112a-113a.

Executive Branch officials have concluded that the PFLP's activities abroad pose a substantial threat to

American foreign policy and national security interests. The First Amendment does not preclude the government from considering an otherwise-deportable alien's material support for a hostile foreign organization in determining whether deportation charges should be filed. The court of appeals' contrary holding places unjustified limitations on the ability of Congress to determine which aliens will be permitted to remain in the United States, and on the discretion of the Attorney General in determining how to exercise her enforcement authority under the immigration laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
*Assistant Attorney
General*

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
*Assistant to the Solicitor
General*

DOUGLAS N. LETTER
Attorney

JANUARY 1998

(2)

97 1252 JAN 30 1998

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ET AL., PETITIONER

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI**

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
*Assistant Attorney
General*

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
*Assistant to the Solicitor
General*

DOUGLAS N. LETTER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

257 pp

TABLE OF CONTENTS

	Page
Appendix A (court of appeals' opinion dated July 10, 1997)	1a
Appendix B (district court's order re defendants' motion to dismiss dated Feb. 7, 1997)	22a
Appendix C (district court's order granting plain- tiffs' motion for a preliminary injunction dated Apr. 29, 1996)	44a
Appendix D (court of appeals' opinion dated Nov. 8, 1995)	77a
Appendix E (district court's amended order dated Jan. 7, 1994)	129a
Appendix F (district court's order dated Jan. 7, 1994)	138a
Appendix G (district court's order granting motion for preliminary injunction dated Jan. 7, 1994) ..	151a
Appendix H (court of appeals' opinion dated July 20, 1992)	166a
Appendix I (district court's opinion dated Aug. 31, 1989)	188a
Appendix J (court of appeals' order dated Dec. 23, 1997)	246a
Appendix K (constitutional and statutory provi- sions)	253a

APPENDIX A

**UNITED STATES COURT OF APPEALS
NINTH CIRCUIT**

Nos. 96-55929, 97-55479

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL., PLAINTIFFS

AND

AIAD BARAKAT; NAIM SHARIF; KHADER MUSA HAMIDE;
NUANGUGI JULIE MUNGAI; AYM MUSTAFA OBEID;
AMJAD OBEID; MICHEL IBRAHIM SHEHADEH; BASHAR
AMER, PLAINTIFFS-APPELLEES

v.

JANET RENO, ATTORNEY GENERAL; HAROLD EZELL;
C.M. MCCULLOUGH; DORIS MEISSNER, COMMISSIONER,
INS; ERNEST E. GUSTAFSON, PERSONALLY AND IN HIS
CAPACITY AS PAST DISTRICT DIRECTOR OF THE
IMMIGRATION AND NATURALIZATION SERVICE; RICHARD
K. ROGERS, DISTRICT DIRECTOR, PERSONALLY AND IN
HIS CAPACITY AS DISTRICT DIRECTOR OF THE
IMMIGRATION AND NATURALIZATION SERVICE; GILBERT
REEVES, PERSONALLY AND IN HIS CAPACITY AS AN
OFFICER OF THE IMMIGRATION AND NATURALIZATION
SERVICE; IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANTS-APPELLANTS

[Argued and Submitted June 23, 1997]

[Decided July 10, 1997]

Before: D.W. NELSON and CANBY, Circuit Judges, and TANNER, District Judge.*

D.W. NELSON, Circuit Judge:

The central issues in this case are (1) whether 8 U.S.C. § 1252(g), as amended by the recently enacted Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L. No. 104-208, 110 Stat. 3009, applies retroactively; and (2) whether the provision eliminates federal jurisdiction over a case such as this one, in which aliens have filed a federal suit challenging deportation proceedings on First Amendment grounds before a final order of deportation has been issued. We conclude that subsection (g) applies to pending cases but that the provision does not bar jurisdiction in this case. Because subsection (g) states that it applies "except as provided in this section," we conclude that the amended version of 8 U.S.C. § 1252(f), which permits certain collateral challenges to INS action, also applies by incorporation. We find that subsection (f) allows the instant suit because the factual record for the Plaintiffs' First Amendment claims cannot be developed in administrative proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the decision of the Immigration and Naturalization Service ("INS") to commence deportation proceedings against seven native Palestinians and one native Kenyan affiliated with the Popular Front for the Liberation of Palestine ("PFLP"). The complete factual history of this case is set forth in this court's prior opinion affirming the

* The Honorable Jack E. Tanner, Senior District Judge for the Western District of Washington, sitting by designation.

grant of a preliminary injunction to six of the aliens on First Amendment grounds. See *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1066 (9th Cir.1995) ("*American-Arab I*"). To summarize, briefly:

The eight named aliens in this case, Aiad Barakat, Naim Sharif, Khader Musa Hamide, Nuangugi Julie Mungai, Ayman Mustafa Obeid, Amjad Obeid, Michel Ibrahim Shehadeh, and Bashar Amer, ("Plaintiffs"), have participated in PFLP events to varying degrees. The PFLP is an international organization with ties to Palestine, and which the district court concluded is engaged in a wide range of lawful activities, including the provision of "education, day care, health care, and social security, as well as cultural activities, publications, and political organizing." The government avers that the PFLP is an international terrorist and communist organization, but does not dispute the district court's finding that the organization conducts lawful activities.

In January, 1987, the INS arrested the Plaintiffs and initiated deportation proceedings against them. Six of the Plaintiffs in this case, Barakat, Sharif, Mungai, Ayman Obeid, Amjad Obeid, and Amer, ("the Six") were living in this country under temporary student or visitor visas at the time that this case was filed. The remaining two, Hamide and Shehadeh, were permanent resident aliens. The INS charged all of the Plaintiffs under the McCarran-Walter Act of 1952 ("1952 Act"), which provided for the deportation of aliens "who advocate the economic, international, and governmental doctrines of world communism." 8 U.S.C. § 1251(a)(6)(D) (1988). In addition, the INS charged the Six with non-ideological, technical visa

violations. Former FBI director William Webster testified to Congress that " [a]ll of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation.... [I]f these individuals had been United States citizens, there would not have been a basis for their arrest." *Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987), quoted in *American-Arab I*, 70 F.3d at 1053.

The INS subsequently dropped the ideological charges against the Six and reformulated the 1952 Act charges against Hamide and Shehadeh. Shortly thereafter, INS regional counsel William Odencrantz indicated "that the change in charges was for tactical purposes and that the INS intends to deport all eight plaintiffs because they are members of the PFLP." *American-Arab I*, 70 F.3d at 1053.

Following the repeal of the 1952 Act, the INS commenced proceedings against Hamide and Shehadeh under the "terrorist activity" provision of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), codified as amended at 8 U.S.C. § 1251(a)(4)(B) (rendering deportable "[a]ny alien who has engaged, is engaged, or at any time after entry engages in terrorist activity").¹

¹ For the purposes of the 1990 Act, terrorist activity consists of the commission

in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any

The Plaintiffs filed this federal action to contest the deportation proceedings on First Amendment grounds. They claimed that the INS had singled them out for selective enforcement of the immigration laws in retaliation for their constitutionally protected associational activity. The district court held that it lacked jurisdiction over the claims of Hamide and Shehadeh but granted a preliminary injunction staying the immigration proceedings against the Six. On appeal, this court upheld the injunction and concluded that the court had jurisdiction over the claims of Hamide and Shehadeh. *American-Arab I*, 70 F.3d at 1071. The district court then entered an injunction staying the proceedings against Hamide and Shehadeh.

The government now appeals the district court's decision refusing to dissolve the existing preliminary injunction and granting the injunction in favor of Hamide and Shehadeh. Relying on new evidence submitted to the district court following this court's decision in *American-Arab I*, the government argues that the deportation proceedings were initiated for permissible reasons. Specifically, the government cites to materials detailing the Plaintiffs' support of PFLP fundraising activities and argues that under the applicable First Amendment standard, the Plaintiffs may be sanctioned for this behavior.

In addition, while this appeal was pending, the government filed motions to dismiss the case both with the district court and with this panel. The govern-

individual, organization, or government in conducting a terrorist activity at any time.

8 U.S.C. § 1182(a)(3)(B)(iii).

ment contends that 8 U.S.C. § 1252(g), as amended by IIRIRA, deprives the federal courts of jurisdiction over all claims such as those at issue here, except on review of final deportation orders. The district court has determined that the new statute does not eliminate jurisdiction in this case, and the appeal of the district court's decision has been consolidated with this case.

STANDARD OF REVIEW

The interpretation of a statute is a question of law, which we review de novo. *United States v. Doe*, 109 F.3d 626, 629 (9th Cir.1997).

We review a decision regarding a preliminary injunction for an abuse of discretion. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir.1996). A district court abuses its discretion "if the court bases its decision on an erroneous legal conclusion or on clearly erroneous findings of fact." *American-Arab I*, 70 F.3d at 1062.

DISCUSSION

I. Jurisdiction

IIRIRA amends section 242(g) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1252(g), to provide:

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or

execute removal orders against any alien under this chapter.

Pub.L. No. 104-208, § 306(a). The government argues that subsection (g) applies retroactively and eliminates federal jurisdiction over this case at this stage in the proceedings. While we agree that subsection (g) applies, we hold that it does not deprive the court of jurisdiction in this case.

IIRIRA explicitly provides for the retroactive application of subsection (g).² Section 306(c) states that

the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act and subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)) [8 U.S.C. § 1252(g)], shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Pub.L. No. 104-208, § 306(c) (emphasis added). Thus, the provision carves out an exception to the general rule, specified in section 309(c), that IIRIRA does not apply to pending cases.³

² As IIRIRA expressly addresses the retroactivity of the relevant jurisdictional provision, we need not apply the default rules elaborated in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280-81, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994).

³ Section 309(c) provides:

(c) Transition for Aliens in Proceedings (1) General Rule that New Rules Do Not Apply.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in

Two circuits already have drawn this conclusion. The D.C. Circuit recently held that in a federal suit challenging the execution of a deportation order, the provision governed even though Congress enacted IIRIRA “[s]ubsequent to the District Court hearing.” *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997). And in a decision holding that the effective date of amended 8 U.S.C. § 1252(g) was the same as the rest of the IIRIRA amendments (April 1, 1997), the Seventh Circuit has concluded that “the reference to subsection (g) in section 306(c) is meant only to provide an exception to section 309(c)’s nonretroactivity, so that when IIRA comes into effect on April 1, 1997, subsection (g) will apply retroactively, unlike the other subsections.” *Lalani v. Perryman*, 105 F.3d 334, 336 (7th Cir. 1997). We follow the D.C. and Seventh Circuits and conclude that subsection (g) applies retroactively.

We also conclude, however, that subsection (g) incorporates certain exceptions when it applies to pending cases. Subsection (g) states that “except as provided in this [new] section, [8 U.S.C. § 1252],” no court can consider any claim arising from a decision of the Attorney General “to commence proceedings, adjudicate cases, or execute removal orders against any alien.” The provision thus expressly contem-

exclusion or deportation proceedings as of the title III-A effective date [April 1, 1997]-

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

plates the applicability of other jurisdictional amendments to 8 U.S.C. § 1252. It is true that retroactive application of the entire amended version of 8 U.S.C. § 1252 would threaten to render meaningless section 306(c) of IIRIRA, which provides that in general, the narrow set of jurisdictional reforms codified at 8 U.S.C. § 1252 do not govern in pending cases. Yet a reading of subsection (g) that did not incorporate any exceptions would contradict the plain meaning of the text of (g).

Moreover, such a reading would be illogical. Divorced from all other jurisdictional provisions of IIRIRA, subsection (g) would have a more sweeping impact on cases filed before the statute’s enactment than after that date. Without incorporating any exceptions, the provision appears to cut off federal jurisdiction over all deportation decisions. We do not think that Congress intended such an absurd result. We believe that when it applies to pending cases, (g) must apply along with at least some of the other provisions of section 1252, as amended by IIRIRA.

We must consider, then, which provisions of the amended version of 8 U.S.C. § 1252 are incorporated by reference into subsection (g) and whether any of these provisions preserve federal jurisdiction in this case. One candidate is 8 U.S.C. § 1252(f), which provides:

(f) Limit on injunctive relief

....

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court)

shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.*

Pub. L. No. 104-208, § 306(a) (emphasis added).⁴ Because this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the Plaintiffs' claims.

In determining whether subsection (f) applies, and in interpreting its meaning, we are guided by the well-established principle that where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims. The Supreme Court has stated unequivocally that "serious constitutional question[s] . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603, 108 S. Ct. 2047, 2053, 100 L.Ed.2d 632 (1988) (internal quotation and citation omitted); see also *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 & n. 12, 106 S. Ct. 2133, 2141 & n. 12, 90 L.Ed.2d 623 (1986) (construing Medicare statute as permitting judicial review of regulations promulgated under the statute); *Johnson v. Robison*, 415 U.S. 361,

⁴ "Part IV of this subchapter" refers to statutory provisions governing inspection, apprehension, examination, exclusion, and removal of aliens. See 8 U.S.C. §§ 1221-1251.

373-74, 94 S. Ct. 1160, 1168-69, 39 L.Ed.2d 389 (1974) (interpreting statute appearing to bar all review of veterans-benefits determinations as permitting judicial review of constitutional challenges due to lack of "clear and convincing" evidence that Congress intended to eliminate review of constitutional claims). Under subsection (f), individual aliens would appear to be able to seek judicial review of constitutional claims such as those at issue here.

The government contends that subsection (g) alone applies and that the provision does not cut off federal review of constitutional claims because it allows courts to consider such claims on review of final orders of deportation. The difficulty with this position is that the text of (g) alone does not appear to authorize judicial review of final orders of deportation. The provision can be read as authorizing such review only if it is read in conjunction with other subsections, such as the amended version of 8 U.S.C. 1252(b)(9), which provides:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

Pub.L. No. 104-208, § 306(a). The government makes the alternative argument that if subsection (b)(9) governs, the provision clearly limits judicial review, including review of all constitutional claims, to final orders of deportation.

We disagree. Even if subsection (b)(9) applies along with subsection (g), we believe that subsection (f) must be incorporated as well, and that (f) must be read to preserve judicial review of constitutional claims such as the ones at issue here. Any other reading would present serious constitutional problems. As we determined in *American-Arab I*, and as the government has conceded, neither the immigration judge ("IJ") nor the Board of Immigration Appeals ("BIA") has the authority to consider a selective enforcement claim during a deportation proceeding. *American-Arab I*, 70 F.3d at 1055. Moreover, a selective enforcement claim is not purely legal but rather requires factual proof. *Id.* Thus, the factual record necessary to the adjudication of such a claim would not be available to a federal court reviewing a final deportation order. *Id.* at 1055-56.

In *McNary v. Haitian Refugee Center, Inc.*, the Supreme Court drew a similar conclusion. 498 U.S. 479, 483-84, 111 S. Ct. 888, 891-92, 112 L.Ed.2d 1005 (1991). At issue in *McNary* was a provision of the INA that the government argued limited judicial review to final orders of deportation. Because the factual record necessary to the consideration of the plaintiffs' constitutional and procedural statutory claims could not be developed in administrative proceedings, the Court construed the provision as preserving general federal jurisdiction over the claims at issue in the case. *Id.* at 493-94, 111 S. Ct. at 896-97.

The government's argument that 28 U.S.C. § 2347(b)(3) enables federal appellate courts to remedy the factfinding deficiencies of administrative deportation proceedings in cases such as this one is unpersuasive. Section 2347(b)(3) allows an appellate court

reviewing an agency determination to transfer proceedings to a district court for additional factual development in certain circumstances. However, we have held that this provision is not available on review of deportation proceedings. *American-Arab I*, 70 F.3d at 1056-57; *Ghorbani v. INS*, 686 F.2d 784, 787 n. 4 (9th Cir. 1982). Because the INA limits appellate review to the administrative record, the statute "precludes application of the procedures . . . that permit transfer of a case to a district court for a hearing, under circumstances set forth at 28 U.S.C. § 2347(b)(3)." *Id.* While IIRIRA repeals 8 U.S.C. § 1105a(a), which contained the provision cited in *American-Arab I* and *Ghorbani* confining appellate review to the administrative record, IIRIRA adopts the same requirement. 8 U.S.C. § 1252(b)(4)(A) ("[T]he court of appeals shall decide the petition only on the administrative record on which the order of removal is based.") Thus, the statutory basis for *American-Arab I* and *Ghorbani* remains the same, and these decisions still control.

In addition, IIRIRA expressly forecloses the appellate courts from remanding such cases to the IJ for further factual development under a related provision, 28 U.S.C. § 2347(c) (allowing appellate court to remand to agency for further factual development in certain circumstances). See 8 U.S.C. § 1252(a)(1) (as amended). The government's argument that IIRIRA's express preclusion of section 2347(c) proceedings by negative inference allows proceedings under section 2347(b)(3) does not make sense because the express statutory elimination of section 2347(b)(3) proceedings then would have been unnecessary. Prior to the enactment of IIRIRA, while some cir-

cuits had allowed remand under section 2347(c), even those circuits which permitted remand to the agency under section 2347(c) did not allow proceedings under section 2347(b)(3). See *American-Arab I*, 70 F.3d at 1057; *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977). Thus, Congress needed to act only to cut off the availability of section 2347(c).

Nor does review of a final order of deportation by habeas corpus offer adequate redress for the Plaintiffs' claimed constitutional injuries. The limitations of the new statute on habeas relief remain unclear. See, e.g., *Duldulao v. INS*, 90 F.3d 396, 399 n. 4 (9th Cir. 1996) (declining to reach issue of whether section 440(a) of Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), as incorporated by IIRIRA, limits habeas review); see also *Yang v. INS*, 109 F.3d 1185, 1196 (7th Cir. 1997). Some form of statutory habeas relief may remain available, see *Fernandez v. INS*, 113 F.3d 1151, 1155 (10th Cir. 1997); *Salazar-Haro v. INS*, 95 F.3d 309, 311 (3d Cir. 1996), cert. denied, — U.S. —, 117 S. Ct. 1842, 137 L.Ed.2d 1046 (1997); *Hincapie-Nieto v. INS*, 92 F.3d 27, 31 (2d Cir. 1996), and, indeed, in certain cases habeas review may be constitutionally required, see *Chow v. INS*, 113 F.3d 659, 668 (7th Cir. 1997); *Kolster v. INS*, 101 F.3d 785, 790-91 (1st Cir. 1996). Some courts have relied on the likely availability of habeas to preserve the constitutionality of the jurisdiction-narrowing provisions of the new statute. See, e.g., *Ramallo*, 114 F.3d at 1214; *Chow*, 113 F.3d at 668. However, even assuming that habeas relief remains available, it would not provide a sufficient avenue for review of the Plaintiffs' claims in this case. Although habeas was available under the old statutory structure, in *American-Arab I* this

court held that prompt judicial review of the Plaintiffs' claims was required because violation of Plaintiffs' First Amendment interests would amount to irreparable injury that "cannot be vindicated by post-deprivation remedies." *American-Arab I*, 70 F.3d at 1057.

In sum, we conclude that while subsection (g) applies to pending cases, it incorporates subsection (f). Moreover, even if (b)(9) is incorporated along with (f), we read (f) as permitting federal review of constitutional claims such as those at issue here, because no other avenues of meaningful federal review remain available. Accordingly, the district court may retain jurisdiction over this case.

II. Preliminary Injunction

This court already has upheld the preliminary injunction in favor of the Six. In *American-Arab I*, we held that "[t]he aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights." 70 F.3d at 1066. We reached this conclusion because we affirmed the district court's finding that the Plaintiffs had made out a prima facie case of selective enforcement by showing (1) others similarly situated were not prosecuted (disparate impact)⁵ and (2) the prosecution was

⁵ The district court selected as a control group "those aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates." *American-Arab I*, 70 F.3d at 1063. Before the district court, the Plaintiffs introduced copious evidence that the government did not seek to deport aliens affiliated with

based on an impermissible motive (discriminatory motive). *Id.* at 1062. We determined that the Plaintiffs had made a sufficient showing of discriminatory motive by demonstrating that the government targeted them "because of their associational activities with particular disfavored groups," and because the government did not establish that the Plaintiffs had the "specific intent to further [any alleged] . . . illegal aims" of those groups. *Id.* at 1063 (quoting *Healy v. James*, 408 U.S. 169, 186, 92 S.Ct. 2338, 2348, 33 L.Ed.2d 266 (1972)). Following our decision, the district court granted an additional preliminary injunction that included Hamide and Shehadeh.

The government has now presented new evidence in the district court showing that the Plaintiffs participated in fundraising activities for the PFLP. The government argues that the submission of this evidence has two consequences: First, the government contends that there is no longer sufficient evidence to sustain the district court's finding of disparate impact. Second, the government maintains that the standard under which the district court analyzed the evidence of discriminatory motive is no longer applicable. In evaluating the preliminary injunction in favor of the Six, we need not consider either of the government's arguments. As applied to

groups such as the Nicaraguan Contras, the Afghanistan Mujahedin, the Mozambique RENAMO, anti-Castro Cuban groups, and the Vietnamese Montagnards, which have advocated violence and the destruction of property. The Plaintiffs also submitted evidence showing that the government rarely took action against nonresident aliens for technical visa violations.

the preliminary injunction in favor of Hamide and Shehadeh, both arguments are without merit.

A. Preliminary injunction in favor of the Six

With respect to the preliminary injunction granted in favor of the Six, we need not address either of the government's arguments. The government has not demonstrated changed circumstances. See *Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332, 337 (3d Cir. 1993) (noting that modification of a preliminary injunction requires changed circumstances that would render continuance of injunction in its original form inequitable); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 810 (9th Cir. 1963) (same). Moreover, it is improper to use a motion to dissolve an existing preliminary injunction to "try . . . to relitigate on a fuller record preliminary injunction issues already decided." *American Optical Co. v. Rayex Corp.*, 394 F.2d 155, 155 (2d Cir.1968).

The district court concluded, and the government does not appear to dispute, that "the government's new 10,000-page submission was available to the government at the time the preliminary injunction was entered; the government simply chose not to litigate the facts at that time." Up until that point, the government had argued that the Plaintiffs did not possess the same First Amendment rights as citizens. Because the only change in circumstances is of the government's own making, resulting from its decision to change its litigation strategy, we conclude that it is equitable to continue the original injunction staying proceedings against the Six without consideration of the new evidence.

B. Preliminary injunction in favor of Hamide and Shehadeh

1. Disparate impact

The government contends that the district court's finding of disparate impact is clearly erroneous because the Plaintiffs have failed to produce sufficient evidence showing that the INS refrained from deporting fundraisers in other terrorist organizations. Yet the government does not dispute the district court's conclusion that the INS sought to deport the Plaintiffs because of mere membership in the PFLP. As Plaintiffs did show that members of numerous other organizations advocating violence and the destruction of property were not deported, the comparison with aliens who engaged in fundraising for other terrorist organizations is unnecessary.

Even if such a comparison were required, the Plaintiffs have produced sufficient evidence to this effect. The Plaintiffs identified Toryalai Ali, a permanent resident alien living in San Diego who represented a Mujahedin guerrilla organization and who contributes approximately half of his income to the group. In addition, the Plaintiffs introduced evidence to show that the government did not seek to deport aliens who distributed a newsletter designed to build support for the Nicaraguan contras and which included an appeal to send money to support the Nicaraguan Democratic Forces. The Plaintiffs also submitted asylum files obtained in discovery demonstrating that the INS did not move to deport 59 out of 65 members and material supporters of the Contras and Mujahedin.

The government's assertion that "the district court had no evidence regarding a proper control group for Hamide and Shehadeh, who are permanent resident aliens" is also incorrect. As discussed above, the record contained evidence that Toryalai Ali, a permanent resident alien, was not deported despite his leadership role and financial contributions to a sub-group of the Mujahedin. The record contains evidence of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property.

The district court did not clearly err in finding that the Plaintiffs established disparate impact.⁶

2. Improper motive

The district court found that, even after the government made its supplemental evidentiary submission, there was "no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." The government does not contest this finding. Accordingly, for the purposes of the First Amendment analysis, we assume that the Plaintiffs did not possess specific intent.

⁶ The government's suggestion that the Supreme Court's recent decision in *United States v. Armstrong*, — U.S. —, 116 S. Ct. 1480, 134 L.Ed.2d 687 (1996), upsets the disparate impact finding is without merit. *Armstrong* does not alter the standard for establishing disparate impact. Rather, the case holds that failure to make any showing that similarly situated others were not being prosecuted defeats the selective prosecution claim. *Id.* at —, 116 S.Ct. at 1487. Here, as discussed above, the Plaintiffs submitted extensive evidence that the government did not seek to deport similarly situated others.

The government now tries to evade the specific intent standard we articulated in *American-Arab I*. Relying on the new evidence of fundraising activity, the government contends that a more relaxed First Amendment inquiry is appropriate. Because activity, rather than mere association, is at issue, the government maintains that the case should be analyzed under the standard set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L.Ed.2d 672 (1968) (holding that government has more latitude in restricting expressive conduct than in curtailing pure speech).

Yet in *American-Arab I* we already considered this question. We emphasized that the government was required to show that the Plaintiffs had the "specific intent" to engage in illegal group aims because the Plaintiffs had demonstrated that they were targeted for their "associational activities with particular disfavored groups." 70 F.3d at 1063 (emphasis added). In making this statement, we had before us evidence that these associational activities included fundraising. Thus, we already have made it clear that targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals.

O'Brien is inapplicable in a case such as this one, in which the restrictions are in effect content-based. See *RAV v. City of St. Paul*, 505 U.S. 377, 385, 112 S. Ct. 2538, 2543-44, 120 L.Ed.2d 305 (1992) (citing to *O'Brien* and noting that "[n]onverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses"). Here, the central issue is whether the government impermissi-

bly targeted the Plaintiffs due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property. Thus, the stringent First Amendment standard articulated in *American-Arab I* continues to apply.

Moreover, the government has not challenged the factual finding made by the district court that the INS targeted the Plaintiffs for their mere association with the PFLP. Indeed, in the prior appeal the government conceded that citizens would not have been treated in the same fashion. *American-Arab*, 70 F.3d at 1063. Therefore, regardless of whether the government has demonstrated that the Plaintiffs were also targeted for fundraising activity, the district court's conclusion that the Plaintiffs have made a prima facie showing of the government's improper motive is not clearly erroneous.

CONCLUSION

For the foregoing reasons, we conclude that IIRIRA does not eliminate federal jurisdiction at this stage in the proceedings. We also affirm the district court's decision denying the government's motion to dissolve the preliminary injunction on behalf of the Six and granting the preliminary injunction on behalf of Hamide and Shehadeh.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 87-02107 SVW (Kx)

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL, PLAINTIFFS

v.

JANET RENO, ET AL, DEFENDANTS

[Filed: Feb. 7, 1997]

ORDER RE DEFENDANTS' MOTION TO DISMISS

I. BACKGROUND

On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the 1996 Act" or "IIRIRA"), Pub. L. No. 104-208, 100 Stat. 3009 (1996). Defendants rest their motion on one provision in the IIRIRA, § 306(a), which amends § 242(g) of the Immigration and Nationality Act ("INA") (hereinafter "subsection (g)"). They argue that this provision deprives this Court of its jurisdiction to entertain plaintiffs' constitutional claims, and requires dismissal of the case and vacation of the injunctions.

Subsection (g) states:

EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Section c of Section 306 of the of the IIRIRA sets forth the effective dates for the amendments to the judicial review provisions of the INA that were made by subsections (a) and (b) of Section 306. Section 306(c) states

(c) Effective Date.

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, *except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.*

IIRIRA § 306(c) (as amended by Act of October 11, 1996, Pub. L. No. 104-302, 110 Stat. 3656, making technical corrections to Illegal Immigration Reform and Immigrant Responsibility Act of 1996) (emphasis added).

As stated in Section 306(c), Section 309 establishes the effective date provisions for Sections 306(a) and 306(b). Section 309 states:

SEC. 309 EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—*Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act.*

IIRIRA § 309(a) (emphasis added).

The government's argument is straightforward. The instant action arises "from the decision or action by the Attorney General to commence [and] adjudicate proceedings" against the plaintiffs, and therefore falls squarely within the terms of the amended statute. In addition, section 306(c) of the 1996 Act makes clear that Congress intended the amended section 242(g) to apply to pending cases. Thus according to the plain language of section 242(g), this Court is divested jurisdiction over all of the claims that Plaintiffs have made in this case.

Plaintiffs contend that under the government's interpretation, subsection (g) violates "Article III, the First Amendment, and the Due Process Clause." However, Plaintiffs claim that the "serious constitutional questions" raised by Defendants' reading of subsection (g) can be avoided in several ways. Plaintiffs offer this Court several ways to "avoid" the alleged "serious constitutional questions raised by Defendants' reading of subsection (g)."

(1) Defendants' motion is premature, because subsection (g) does not take effect until April 1, 1997.

(2) Congress expressly provided in the IIRIRA that none of the judicial review amendments in § 306 would apply to aliens in pending deportation proceedings as of April 1, 1997. Because Plaintiffs are all in pending deportation proceedings, Plaintiffs' "proceedings (including judicial review thereof) shall continue to be conducted without regard to [the §306] amendments." IIRIRA, § 309(c).

(3) Subsection (g) does not expressly bar review of *constitutional* claims, and thus it should be construed to preserve jurisdiction to entertain such challenges.

(4) Subsection (g) precludes judicial review of decisions to commence proceedings only where such review is not otherwise "provided in this section." But another provision in this section, according to Plaintiffs, explicitly provides for injunctive relief to "an individual alien against whom [deportation] proceedings . . . have been initiated." IIRIRA, § 306(a) (amending INA, §242(f)) ("subsection f"). As individual aliens against whom deportation proceedings have been initiated, Plaintiffs argue that they are entitled under subsection (f) to seek an injunction against the deportation proceedings. Given that authorization, they claim that subsection (g) does not bar Plaintiffs' claim.

In the event that this Court finds that it cannot avoid the constitutional issues subsection (g) raises, Plaintiffs urge this Court to strike down the statute as unconstitutional.

II. Legal Analysis

A. Effective Date of Subsection (g)

1. Why the Effective Date of Subsection (g) is Important.

Plaintiffs claim that subsection (g) does not go into effect until April 1, 1997. Defendants claim that subsection (g) has been in effect ever since President Clinton signed IIRIRA into law on September 30, 1996. Why does this dispute matter?

Plaintiffs are not just trying to buy time. They argue both that subsection (g) does not go into effect until April 1, 1997 and that when it does go into effect it will not apply to Plaintiffs. IIRIRA § 309(c)(1) provides that for those aliens in deportation proceedings as of April 1, 1997, "the amendments made by this subtitle shall not apply," and "the proceedings [including judicial review thereof] shall continue to be conducted without regard to such amendments"—i.e., under prior law. The government has admitted this point elsewhere. Supplemental Brief for the Petitioner at 6, *INS v. Yang*, 65 U.S.L.W. 4009, (Nov. 13, 1996) (stating that the § 306 judicial review amendments do not apply "in any case in which the administrative exclusion or deportation proceeding were instituted prior to April 1, 1997").

Defendants respond that § 306(c) dictates that subsection (g) applies "*without limitation* to claims arising from all past, pending, or future . . . deporta-

tion . . . proceedings under such Act." Plaintiffs reply that "this must be read consistently with the 'transition' rules, which provide that none of the judicial review amendments §306 applies to pending proceedings." The Court disagrees with Plaintiffs' reply. There is nothing "inconsistent" in the position that subsection (g) applies to pending cases. Plaintiffs have confused an exception with an inconsistency. Subsection (g) clearly states that it applies "without limitation." The "without limitation" language in subsection (g) makes it an exception from § 309(c)'s general rule that the new judicial review rules will not apply to pending cases. There is no logical inconsistency in reading a statute as establishing a general rule in one section and as making an exception to that general rule in another section. Any other reading of the statute would be "inconsistent" with the "without limitation" language in § 306(c).

Moreover, the "transition rules" give the Attorney General the option in pending deportation cases in which an evidentiary has commenced to elect to proceed under the new judicial review rules, by terminating the proceedings and initiating new proceedings. IIRIRA, § 309(c)(3). Thus, even if 309(c) does place a limitation on § 306(c), the Attorney General could terminate the old deportation proceeding and start again under the new rules. Plaintiffs' response to this scenario is unconvincing. They claim that the Attorney General is enjoined from this Court's order from "conducting further deportation proceedings" until plaintiffs selective prosecution claims are finally resolved. This argument, however, puts the cart before the horse. When section 242(g) goes into

effect it will strip this Court of jurisdiction over Plaintiffs' claims'. The Court's previous order will no longer have any force, and the Court will lack the authority to order any new injunctions. Only if subsection (g) does not apply to Plaintiffs' claims would the Court be able to block the initiation of new proceedings under its standing injunction.

Plaintiffs further argue that subsection (f) of IIRIRA authorizes the very type of injunctive relief Plaintiffs seek here. Section 242 (f) precludes class-action relief, but expressly provides for injunctive relief for "an individual alien against whom [deportation] proceedings under such chapter have been initiated." IIRIRA, § 306(a)(2) (amending INA, § 242(f)).

Defendants respond with the claim that reading subsection (f) to authorize Plaintiffs' suit would render subsection (g) meaningless. Plaintiffs reply to this argument is persuasive. Subsection (g) by its own terms only precludes jurisdiction where its not otherwise provided in the judicial review amendments, and thus it explicitly contemplates that other provisions will in fact provide jurisdiction. Moreover, under Plaintiffs' reading, subsection (g) would still have meaning, for it would restrict to the court of appeals all challenges to commencement of proceedings and adjudication of cases that do not require injunctive relief or factual development beyond the scope of the deportation hearing. For example, an alien who claimed that his deportation proceeding has commenced without sufficient evidence would be barred by subsection (g) from seeking immediate judicial review of that claim. Similarly, an alien who challenged the adjudication of his case by objecting to the introduction of certain evidence would be required

by subsection (g) to seek review only in the court of appeals. But where, as here, individual aliens in deportation proceedings challenge the very proceedings themselves as selective prosecution in retaliation for their exercise of First Amendment rights, subsection (f) authorizes injunctive relief. Defendants' contrary position, according to Plaintiffs' would render meaningless the last clause of subsection (f), permitting "an individual alien" in deportation proceedings to seek injunctive relief. In Defendant's view, an individual alien in deportation proceedings could never seek injunctive relief.

However, subsection (f) does not take effect until April 1, 1997. Thus, while Plaintiffs could in theory seek an injunction under subsection (f) on April 1, 1997, nothing in subsection (f) provides a current basis for jurisdiction. In other words, the issue this Court faces is whether or not it has the authority to hear this action today, not whether several months from now it will have that power, thus, the importance of the effective date of subsection (g). If subsection (g) went into effect on September 30, 1996, the possible availability of subsection (f) will not avail Plaintiffs today.

2. The Effective Date of Subsection (g) was September 30, 1996.

The Court bears in mind that, as a matter of statutory construction, a statute is deemed effective immediately absent an express provision in the statute to the contrary. *United States v. Shaffer*, 789 F.2d 682, 686 (9th Cir. 1986). Thus, the Court is confronted with three possibilities, two of which are winners for the government's position.

(1) Subsection (g) took effect immediately on September 30, 1996.

(2) Subsection (g) takes effect on April 1, 1997.

(3) The statute is ambiguous as to subsection (g)'s effective date. If the statute is ambiguous, the Court should follow the presumption that subsection (g) went into immediate effect on September 30, 1996.

Plaintiffs argue that Subsection (g) is just one part of a comprehensive revision of the judicial review provisions, and § 309(a) provides that the judicial review amendments generally do not take effect until April 1, 1997.

Given the effective date language in § 309(a), unless there is some specific contrary instruction, subsection (g) takes effect, along with the rest of the judicial review amendments, on April 1, 1997. Defendants point to § 306(c). Plaintiffs counter that § 306(c) merely describes the scope of subsection (g)'s application. It says nothing about when the provision actually takes effect, and applies without limitation to claims arising from past, pending, and future exclusion and deportation proceedings. But since nothing in § 306(c) states that subsection (g) takes effect immediately, its effective date is governed by § 309(a), and it takes effect April 1, 1997.

Plaintiffs strengthen their reading by pointing out that the language of subsection (g) would make no sense if it took effect before the rest of the judicial review provisions in § 306. Section 242(g)'s title is "EXCLUSIVE JURISDICTION," but if subsection (g) took effect before the rest of the judicial review

provisions, it would deny all judicial review of the claims described, rather than simply confirming that jurisdiction over such claims is governed "exclusively" by other sections of the judicial review amendments. In addition, subsection (g)'s opening clause, "Except as provided in this section," would be meaningless if subsection (g) took effect before the rest of the judicial review section—the clause would have no referent. Thus, in order to make subsection (g) meaningful, it must be read, according to Plaintiffs to take effect at the same time that the rest of the judicial review section does.

Plaintiffs' argument is not entirely convincing. Section 309(a) establishes the general effective date for judicial review amendments as April 1, 1997, "except as provided in . . . section . . . 306(c)." Plaintiffs' reading would leave the exception in Section 309(a) without a referent. In other words, if § 306(c) doesn't create an exception to § 309(a), why does § 309(a) say "except as provided in . . . section . . . 306(c)"? Plaintiffs reply that the "exception" in Section 309(a) for section 306(c) does not establish a different "effective date," but merely ensures that § 309(a) will not be read to preclude retroactive application of subsection (g) once it becomes effective, on April 1.

Plaintiffs' reply, however, has not assuaged the Court's doubts. Their "clarification" still strips the "exception" in Section 309(a) of meaning. If Section 306(c) indicates that subsection (g) has retroactive effect, then it does not create an "exception" to the start dates in Section 309(a). The retroactive effect of a statute, as Plaintiffs themselves claim, concerns the scope of a statute not its effective date. In other

words, the statute tells the reader "to go look in Section 306(c) for an exception to the start dates in Section 309(a)." According to Plaintiffs, however, when we get to Section 309(a), instead we encounter a command that Section 306(c) have retroactive effect when it goes into effect on the start dates established in Section 309(a), but, as we know, Section 309(a) tells us to go to Section 306(c). The statute places the reader in a textual loop.

The courts have created a presumption that statutes go into effect immediately unless Congress expressly provides otherwise. Here the Court does not find an express provision of Congressional intent. Instead, the Court encounters horrid ambiguity. Absent the presumption of immediate effect, this Court would perhaps adopt Plaintiffs' reading as the lesser of interpretive evils. However, with the presumption in effect as a background principle of statutory interpretation, this Court finds, in light of the statute's inherent ambiguity, subsection (g) went into effect immediately on September 30, 1996.

B. Presumption that Door Closing Statutes Do Not Bar Review of Constitutional Claims.

The extent to which Congress can regulate the jurisdiction of the federal courts is one of the great unresolved issues of constitutional law. While it cannot be doubted that Congress has the power to shape the jurisdiction of the federal courts, it is unclear whether Congress could shut the door on federal court review of constitutional challenges to government action. See, generally, Richard H. Fallon, Daniel J. Metzler & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System*, Chapter IV (4th ed. 1996). The Supreme Court has

avoided ruling on the limits of Congressional power over the jurisdiction of the federal courts by interpreting jurisdictional statutes to allow federal court review of constitutional claims. As Judge Posner recently summarized the law, "The circuits are in agreement: door closing statutes do not, unless Congress expressly provides close the door to constitutional claims." *Czerkies v. United States Dep't of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996) (en banc).¹

In *Johnson v. Robinson*, 415 U.S. 361 (1974), for example, the Supreme Court interpreted a statute that appeared to bar all judicial review of veterans benefits determinations to permit judicial review of constitutional challenges arising from benefits claims.² The *Johnson* Court held that in the absence of "clear and convincing evidence" that Congress spe-

¹ In *Czerkies*, the statute at issue, the Federal Employees Compensation Act, provides that "[t]he action of the Secretary [of Labor] or his designee in allowing or denying a payment under this [Act] is-(1) final and conclusive for all purposes and with respect to all questions of law and fact; and (2) not subject to review by another official of the United States or by a court by mandamus or otherwise." 5 U.S.C. § 8128(b). The Seventh Circuit, en banc, found that the statute's bar on judicial review did not extend to constitutional claims.

² Title 38 U.S.C. § 211(a) provides:

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under Chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any other court of the United States shall have the power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

cifically intended to preclude review of constitutional claims, it would not interpret a statute broadly barring all judicial review to have that effect. 415 U.S. at 373-74.

Similarly, in *Webster v. Doe*, 108 S. Ct. 2047 (1988), the Supreme Court held that while the National Security Act of 1947 precluded judicial review of statutory challenges to CIA employment decisions, constitutional challenges to such decisions were subject to judicial review.³ It did so notwithstanding the fact that the Act drew no distinction between statutory and constitutional claims. The Court held that:

We emphasized in *Johnson v. Robinson*, that *where Congress intends to preclude judicial review of constitutional claims its intent to do so much be clear*. In *Weinberger v. Salfi*, we reaffirmed that view. We require this heightened showing in part to avoid "the serious constitutional question" that would arise if a federal

³ In *Webster*, the Respondent alleged that CIA Director's decision to terminate his employment violated the Administrative Procedure Act (APA), 5 U.S.C. § 706, because it was arbitrary and capricious. He also alleged that the decision to terminate his employment deprived him of several constitutional rights. Section 706 of the APA provides that review of agency action is not available when "agency action is committed to agency discretion by law." Section 102(c) of the National Security Act of 1947, 61 Stat. 498, as amended, provides that:

[T]he Director of the Central Intelligence may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United States"

statute were construed to deny any judicial forum for a colorable constitutional claim.

108 S. Ct. At 2053 (citations omitted) (emphasis added).

Kenneth Culp Davis and Richard J. Pierce sum up the meaning of this line of cases in their authoritative treatise on administrative law. They write,

Taken as a whole, the Court's decisions in this area seem to send a message to Congress: "We do not seek a constitutional confrontation on the question of the power of the power of the courts to resolve disputes concerning the constitutionality of your actions or of the actions you have authorized agencies to take. We will interpret your enactments in a manner that avoids such a confrontation if we possibly can. If you desire a formal resolution of the question of your ability to preclude us from deciding disputes concerning constitutional rights, you must use statutory language that unequivocally requires us to resolve that question, e.g., actions taken pursuant to this statute are not subject to any form of judicial review, including review of the constitutional validity of such actions."

Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative law Treatise*, § 17.9 (1994).

Like the statutes reviewed in *Johnson* and *Webster*, subsection (g) does not specifically deny jurisdiction over constitutional claims. Nowhere in the text or in

the legislative history⁴ does Congress express a clear intent to preclude judicial review of constitutional challenges to a decision to commence deportation hearings. Thus, the Court reads subsection (g) as preserving judicial review over constitutional claims.

The government replies to this analysis with the argument that Section 242(g) only effects the timing of judicial review. In other words, Section 242(g) does not close the door to judicial review of deportation proceedings. It merely postpones judicial review until the end of the administrative process, at which point an alien can appeal an adverse finding to a circuit court. Specifically, subsection (b)(9) provides that "judicial review" of all questions arising from "any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order section." Thus, one could argue, IIRIRA does not bar all judicial review of Plaintiffs' selective prosecution claims, but merely defers review until Plaintiffs appeal to a court of appeals from a final order of deportation. Under this reading, Section 242(g) would encompass constitutional claims because a "heightened showing" of congressional intent to reach constitutional claims is required only when a statute bars all judicial review of constitutional claims.

In support of this proposition the government cites *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 779-81 (1994). In that case the Court held that a door-closing statute in the mine-safety act blocked a non-

⁴ The Joint House-Senate Committee Report on IIRIRA is silent on the issue of whether Section 242(g) reaches constitutional claims. H.R. Conf. Rep. 104-828.

monetary due process claim. The agency that reviewed the mine operators' claims was independent of the agency that regulated the mines. This independent agency had addressed constitutional claims previously and its decisions were reviewable by a federal court of appeals. Since the statute allowed judicial review of final agency determinations, the Court found that the statutory scheme in issue did "not present the 'serious constitutional question' that would arise if an agency statute were construed to preclude all judicial review of a constitutional claim." *Id.* at 780, n. 20.

Plaintiffs argue that Judicial review of final deportation orders under Subsection b(9), however, does not provide an adequate remedy for the constitutional claims raised in this case for three reasons. First, Subsection b(9) does not go into effect until April 1, 1997. Second, the First Amendment claims of Plaintiffs cannot be adequately addressed through judicial review of the final administrative adjudication of their cases. Third, proper appellate review is impossible because the statutory scheme does not allow for the creation of a factual record which could serve as a basis for resolving Plaintiffs' selective prosecution claims.

Subsection (b)(9) does not apply to Plaintiffs. It does not go into effect until April 1, 1997. As discussed above, § 309(a) provides that unless otherwise specified, all of the judicial review amendments take effect on April 1, 1997. Accordingly, Plaintiffs argue that subsection (b)(9) is not effective today, and cannot be relied upon to provide judicial review for Plaintiffs' constitutional claims.

Plaintiffs' argument is unrealistic. If this Court did dismiss Plaintiffs' claims and allowed the administrative deportation proceedings to continue, it would take many months for a final resolution of their cases. Certainly, subsection (b)(9) would be available long before a final order of deportation came down for any of the Plaintiffs.

Plaintiffs second argument, however, is decisive. In this case, Plaintiffs have alleged that the government initiated deportation proceedings against them in retaliation for their exercise of their First Amendment rights. This Court and the Ninth Circuit have already found that the injury to speech and association rights that stems from being targeted for a deportation proceeding is irreparable, and justifies immediate injunction relief. The Ninth Circuit held that:

The legal and practical value of the First Amendment right may be destroyed if not vindicated before trial. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Courts thus grant extraordinary relief because "[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection" so that "the duration of a trial is an intolerably long period during which to permit the continuing impairment of First Amendment rights." Even in the context of state criminal prosecutions, where federalism concerns raise additional barriers to the federal courts' exercise of equitable jurisdiction, federal courts refuse to abstain in cases

involving a bad faith prosecution that has little expectation of a valid conviction or is initiated to retaliate for or discourage the exercise of constitutional rights. We find that the perpetual threat of deportation based on group affiliation constitutes the kind of irreparable injury that is relevant to the ripeness inquiry here.

American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045, 1058 (9th Cir. 1996) (hereinafter "*AAADC v. Reno*") (citations omitted).

The Ninth Circuit upheld this Court's preliminary injunction in favor of six of the Plaintiffs based on its conclusion that

The aliens have provided evidence of disparate impact and of impermissibly motivated enforcement of the immigration laws. The aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights.

Id. at 1066.

Even if a court of appeals could ultimately hear Plaintiffs' claim, Plaintiffs would be required to undergo an extended deportation hearing and administrative appeal before obtaining judicial review. In the interim, Plaintiffs would suffer irreparable injury to constitutional rights, without access to a judicial remedy. Thus, Section 242(g) does more than affect the timing of judicial review. Under the Ninth Circuit's holding, post-deprivation review of Plaintiffs' constitutional claims is inherently inadequate. The

immediate harm suffered by Plaintiffs is addressed either now or never. If Section 242(g) reached Plaintiffs claims, then it would shut the door on adequate judicial review of their constitutional claims. If Congress intended to close the door on Constitutional claims, then, as discussed above, Congress must make its intent clear.⁵

Finally, Plaintiffs argue, that even if in theory post-deprivation judicial review was sufficient, the statutory scheme created by Congress in the IIRIRA does not provide an adequate record for judicial review. Under current law, immigration judges have no authority to adjudicate selective prosecution cases. *AAADC v. Reno*, 70 F.3d at 1055-56. Neither Congress nor the INS has altered the authority of immigration judges. If the immigration judge cannot develop the facts underlying a selective prosecution claim, then the court of appeals on review cannot decide the claim. *Id.* Appellate review is limited to "The administrative record on which the order of removal is based." INA, § 242(b)(4)(A), as amended. Without a factual record, the Ninth Circuit would have no basis for resolving Plaintiffs' selective prosecution claims.

Plaintiffs demolish this line of argument in their papers. They point out that the government does not dispute that under IIRIRA, appellate review is lim-

⁵ Tellingly, the government never cites *AAADC v. Reno* in any of its briefs. Instead, without actually declaring its intentions, the government makes a weak stab at relitigating the issue of whether or not Plaintiffs' claims warrant immediate judicial review. This issue, however, has now been decisively settled through the decisions of this Court and the Ninth Circuit and is, in effect, *res judicata*.

ited to the administrative record. Nor does the government dispute that immigration judges and the BIA lack authority to consider selective prosecution claims in adjudicating deportation cases. Instead, they suggest that this problem can be averted by Plaintiffs "proffering whatever claims or evidence they want to the immigration courts," and then raising the selective prosecution claim for the first time in the court of appeals. They also suggest that the court of appeals could remand to a district court to develop facts under 28 U.S.C. § 2347(b), if the court deemed that necessary to resolve the selective enforcement claims.

The Court agrees with Plaintiffs that if the availability of "proffer" before the immigration judge were sufficient to provide adequate appellate review, the Ninth Circuit's decision in *AAADC v. Reno* affirming this Court's jurisdiction would have come out the other way; a "proffer" to the immigration judge was just as theoretically available then as now.

Moreover, as Plaintiffs point out, a mere "proffer" is not sufficient to develop facts necessary for appellate review of constitutional claims like the selective prosecution claim here. Plaintiffs claim requires extensive discovery, and as the central issues of motive and selection will likely be disputed, will require an evidentiary hearing, including the taking of testimony and assessments of credibility. Since the immigration judge has no authority to hear a selective prosecution claim, the immigration judge would have no warrant to authorize discovery on this issue, or hear evidence and make factual findings. The court of appeals certainly cannot order discovery, hear testimony, assess credibility of witness, or make factual

findings. Thus, a "proffer" could not possibly provide the factual development necessary for resolution of Plaintiffs selective prosecution claim.

Defendants suggest that a remand to district court under 28 U.S.C. § 2347(b) might be appropriate. But nothing in IIRIRA changes the Ninth Circuit's holding that § 2347(b) "does not apply in the immigration context." *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d at 1057. Indeed, the IIRIRA confirms that holding, by expressly limiting appellate court review to "the administrative record on which the order of removal is based." INA, § 242(b)(4)(B). A remand to the district court for factual findings would directly conflict with the statute, because any facts developed would by definition be beyond the administrative record. Thus, the appellate review the IIRIRA provides is clearly inadequate.

III. CONCLUSION

Plaintiffs' First Amendment injuries are immediate and cannot be addressed through post-deprivation review. Congress can bar the door to these claims, and bring on a serious constitutional confrontation, only if it acts with clear purpose. No such purpose has been displayed here, and thus, this Court finds that Section 242(g) does not reach the constitutional

claims at issue in this case. This Court DENIES the Government's Motion to Dismiss.

IT IS SO ORDERED.

DATED: 2/5/97

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-2107 SVW (KX)

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL., PLAINTIFFS

v.

JANET RENO, ETC., ET AL., DEFENDANTS

[Filed Apr. 29, 1996]

**ORDER GRANTING PLAINTIFFS' MOTION FOR
A PRELIMINARY INJUNCTION AS TO HAMIDE AND
SHEHADEH AND DENYING DEFENDANTS' MOTION
TO DISSOLVE THE PRELIMINARY INJUNCTION
AS TO THE SIX**

After the Ninth Circuit reversed this Court's holding, that it lacked jurisdiction to enter a preliminary injunction as to plaintiffs Hamide and Shehadeh ("the Two"), *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045 (9th Cir. 1995) ("AAADC"), the Two filed a renewed motion for a preliminary injunction. Shortly thereafter, the government filed a motion to dissolve the preliminary injunction that is currently in force as to plaintiffs Mungai, Amer, Barakat, Sharif, Ayman Obeid, and Amjad Obeid ("the Six"). The two motions were

briefed together and were heard on April 8, 1996. For the reasons that follow, the Court grants plaintiffs' motion and denies the government's motion.

I. BACKGROUND

Plaintiffs' motion should be granted if the Two establish a prima facie case (or colorable showing) that the filing of the McCarran-Walter ideological deportation charges against them in April 1987 (or the addition in 1991 of new ideological charges under the Immigration Act of 1990) constituted selective enforcement in that (1) the motivation for the charges was the Two's constitutionally protected association with the PFLP; and (2) similarly situated others were not charged. *See AAADC*, 70 F.3d at 1062.

The government's motion should be granted if it shows that changed circumstances (from the time the preliminary injunction was entered) render the Six unlikely to prevail on their claims that the filing of non-ideological deportation charges against them in January 1987 constituted selective enforcement. *See, e.g., Favia v. Indiana Univ. of Pennsylvania*, 7 F.3d 332, 337 (3d Cir. 1993) ("Modification of an injunction is proper only when there has been a change of circumstances between entry of the injunction and the filing of the motion that would render the continuance of the injunction in its original form inequitable") (citation omitted); *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 810 (9th Cir.), cert. denied, 375 U.S. 821 (1963).

A The Government's Change in Strategy

Until now, the government's position has been that plaintiffs, as aliens, did not have the same First Amendment associational rights as citizens, and thus that plaintiffs' association with the PFLP rendered

them deportable even though (as CIA Director William Webster admitted, *Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987) ("Webster Testimony")) citizens could not be arrested for the same conduct. This Court and then the Ninth Circuit both rejected this argument, and held that plaintiffs enjoyed the same First Amendment rights as citizens. *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060 (C.D. Cal. 1989); *AAADC, supra*. Thus, if citizens could not have been arrested consistent with the First Amendment for the conduct engaged in by plaintiffs, then neither could plaintiffs.

Having lost its legal argument, the government now argues the facts. As the Ninth Circuit noted, 70 F.3d at 1063, the government never presented any evidence about what conduct plaintiffs had engaged in; now it must. In essence, the government now has no choice but to argue, in spite of Webster's testimony to the contrary, that plaintiffs in fact did engage in conduct that would have subjected citizens to arrest.

II. DISCUSSION

A. *Healy* is the Applicable First Amendment Standard

In its recent opinion, the Ninth Circuit set forth the standard the government must meet in order to prove that plaintiffs engaged in unprotected conduct: "knowing affiliation" with an organization that engaged in some unlawful activities and the "specific intent to further those illegal aims." 70 F.3d at 1063 (quoting *Healy v. James*, 408 U.S. 169, 186, 92 S. Ct. 2338, 2348 (1972)). This standard appears to be the

equivalent (in the association context) of the *Brandenburg* standard, which limits the punishment of advocacy to where it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829 (1969). See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920 n.56, 102 S. Ct. 3409, 3429 n.56 (1982).¹

1. *The PFLP Does Engage in Lawful Activities*

Underlying the application of this standard is the determination that while the PFLP engages in unlawful activities, it also engages in lawful activities. Therefore, association *simpliciter* with the PFLP is protected by the First Amendment. This Court has held explicitly that:

The PFLP is not solely a criminal organization. It does more than conduct terrorist operations. Thus, support of the PFLP or association with the PFLP would not be a permissible basis for the government to use in determining whom to prosecute.

Jan 11, 1994 Order Re: Discovery on Sel. Pros. at 7.

The government's own evidence submitted on the instant motions shows that the PFLP engages in lawful activities. Among many other examples of

¹ At the April 8, 1996 hearing, the Court questioned the parties with respect to the relationship between the standards enunciated in *Healy* and *Brandenburg*. David Cole, plaintiffs' counsel, stated that there was no authority on the question whether a person may be punished for specifically intending to further future, non-imminent, unlawful activity, or in other words, whether *Brandenburg* offers broader protection to advocacy than *Healy* extends to association. See Apr. 8, 1996 Tr. at 65-66.

such evidence, the Palestine Youth Organization, which the government claims is a front for the PFLP, sponsors sports, games, cultural events, and political demonstrations. Markardt Dec., Exh. 11A, p. 1027-32; 11B, p. 1036-48. The government has also submitted papers seized from Evelyn Zakhary which show that the PFLP distributes literature, sponsors educational, cultural, recreational, and political events. *Id.*, Exh. E, p. 252-78. In addition, evidence submitted years ago in this action showed that the PFLP devotes significant resources to lawful activities, such as providing social services like education, day care, health care, and social security, as well as cultural activities, publications, and political organizing. See Pl. Reply at 19.

Nowhere in the government's papers does it state that it is seeking reconsideration of this Court's express holding that the PFLP engages in lawful activities. But the vast majority of the government's submission is intelligible only in the context of such an argument, for it relates only to the PFLP generally, rather than to plaintiffs as individuals. The government has submitted book-length tracts published by the PFLP explaining its interpretation of Marxist-Leninist ideology. It has submitted dozens of issues of *Al-Hadaf*, the PFLP's official newspaper, none of which mention any of the plaintiffs. It has also submitted extensive hearsay compilations of the acts of terrorism linked to the PFLP over the years, in none of which any of the plaintiffs are in any way implicated.

2. *The Government's Inappropriate Attempt to Relitigate the First Amendment Issue*

In other words, the government has devoted most of its efforts to painting the PFLP as a terrorist organization, rather than painting plaintiffs as terrorists. But, put simply, the nefarious nature of the PFLP is irrelevant under the *Healy* specific intent standard. The government's confusion (or worse) is exemplified by the fact that its opening brief did not even mention the *Healy* standard, even though barely three months had passed since the Ninth Circuit had expressly held that it governed this case.

Instead, the government attempts to relitigate the question of the applicable First Amendment standard. It devotes much of its opening brief to arguing for the application of a deferential "immigration context" standard based on *Kleindeinst v. Mandel*, 408 U.S. 753 (1972), and *Fiallo v. Bell*, 430 U.S. 787 (1977), cases which this Court and the Ninth Circuit distinguished as involving exclusion rather than deportation. See 714 F. Supp. at 1075-77; 70 F.3d at 1064-65. The government contends that since the Ninth Circuit's holding was made in the context of an appeal of a preliminary injunction rather than a final judgment, it is not the law of the case. Whatever the merit of this contention, it ignores the seemingly obvious fact that this Court is bound to follow every decision of the Ninth Circuit. The government's law of the case argument is an irrelevant distraction.

In summary, then, in order to defeat plaintiffs' motion as to the Two and to prevail on its own motion, the government must show that plaintiffs had the specific intent to further the PFLP's unlawful aims. If plaintiffs had such specific intent, the government's discriminatory selection of them for deportation would be based on a permissible reason, rather than the impermissible reason of their association with the

PFLP.² Since plaintiffs cannot prevail on the discriminatory motive prong of their selective enforcement claims unless the basis for the discrimination is impermissible, plaintiffs would thus be unlikely to prevail on such claims. If the government does not make such a showing, the Court should (1) reaffirm its preliminary conclusion as to the Six that the government's basis for selecting them was their First Amendment-protected association with the PFLP, and thus deny the government's motion; and (2) make the same preliminary conclusion as to the Two (for the same reasons as the Court relied upon for the Six), and thus grant plaintiffs' motion.³

² Technically, plaintiffs bear the burden of persuasion on their claim for a preliminary injunction. However, the Two rely on the same evidence regarding discriminatory intent and disparate impact as the Court found justified a preliminary injunction as to the Six. The Court therefore finds that, like the Six, the Two are likely to prevail on their selective enforcement claims unless the government can show that its selection of them was based on a permissible reason. Thus, the issues for the two instant motions converge.

³ The government makes one additional argument as to why plaintiffs are unlikely to prevail. It contends that the decision to deport plaintiffs was made by Elizabeth Hacker, INS District Counsel in Los Angeles, and that no other INS offices or other federal agencies were involved in the decision. If this were true, it would mean that the control group would have to be limited to the Los Angeles INS office, and the government says that there is no evidence that similarly situated others were not deported by that office. Plaintiffs would thus be unlikely to prevail on the disparate impact prong of their selective enforcement claims.

The Court rejects this argument. Abundant evidence shows that higher-up national and regional INS officials, as well as representatives of the FBI, were involved in the decisionmaking process. The two memoranda the Court recently held not

B. The Government's Showing

The government faces several obstacles in its attempt to make the required showing. First, plaintiffs make a strong argument that the Court should refuse even to consider some 8500 pages of the government's approximately 10,000-page submission, at least as to the Six. Second, even if the Court were to consider the whole submission, most of it is irrelevant because it relates only to the PFLP, rather than to the decision to deport plaintiffs, and much of the submission is otherwise inadmissible. Finally, and most funda-

privileged are two of many examples of such evidence. See Order to Compel, March 6, 1996. Neither of the two memos was written to or by anyone in the Los Angeles INS office, and one reveals the involvement of the INS commissioner himself. While it may be technically true that an official from the Los Angeles office signed off on the orders to show cause, it is disingenuous to suggest that this means the decision to deport plaintiffs was made exclusively in the Los Angeles office.

United States v. Gomez-Lopez, 62 F.3d 304 (9th Cir. 1995), on which the government relies, is not to the contrary. In that case, the Ninth Circuit held that circuit-wide discovery was improper in a criminal case where the defendant had been charged pursuant to guidelines developed solely by the local United States Attorney's Office, "without consultation with any other USAO or with Department of Justice officials in Washington, D.C." *Id.* at 305. While in *Gomez-Lopez* there was "no evidence indicating that there is communication or coordination among the USAOs within the circuit that *could* have affected the decision to prosecute," *id.* at 307 (emphasis in original), in the instant case there is plentiful evidence of high-level, national coordination between INS, FBI, and DOJ officials that demonstrates quite clearly that "the decision to prosecute" plaintiffs was "affected" by events far beyond the confines of the INS Los Angeles office. The "scope of the discovery" ordered by this Court thus "bear[s] a reasonable relationship to the decision" to deport plaintiffs. *Id.* at 306.

mentally, what "evidence" the government does have regarding plaintiffs does not show that any of the plaintiffs had the specific intent to further the PFLP's unlawful activities.

1. Should the Court Consider the Newly Submitted Evidence?

The government has submitted approximately 10,000 pages of documents on the instant motions. The government produced approximately 1500 pages of documents in discovery, most of which it included in its 10,000-page submission. Plaintiffs argue that the remaining 8500 pages should not be considered.

At the hearing held on August 16, 1995 on the motion to compel filed by the Six, one issue was plaintiffs' request for production of documents reflecting upon the INS's decision to file the deportation charges that were in the possession of the FBI or DOJ rather than the INS itself. The government had produced approximately 1500 pages of documents in discovery up to that point.⁴ Plaintiffs thought other documents existed that might be relevant to the question of the government's motivation in deciding to deport plaintiffs, and they thought that some of these might be in the possession of the FBI or DOJ. Plaintiffs therefore asked that the INS be required to

⁴ Defendants produced the following: a four-volume FBI report by SA Frank Knight, attached to Knight's Declaration as Exh. 45; a videotape of the St. Nicholas dinner, attached as Exh. 16A to Knight's Declaration; plaintiffs' immigration files (which plaintiffs say appear to be irrelevant to the instant motions and which the government did not include in its 10,000 page submission); various FBI and INS memos regarding the investigation of plaintiffs. See Pl. Appendix of Materials Produced by Def. (March 20, 1996).

produce all relevant documents, not just those in its possession.

At the August 16 hearing, the government's attorney, Michael Lindemann, said: "We have produced all of the materials that INS had at hand when it made that decision. Things that the INS never saw could have no bearing on the INS's decision to prosecute." Tr. at 7. The Court was not immediately satisfied, and pressed the government on the question of discussions between INS and other agencies. "Are you telling me that there are no documents in the possession of the FBI or Justice Department which reflect upon the decision to deport these people?" Lindemann answered, "Your Honor, you have them all." The Court asked again, "So you're saying there are no others?" Lindemann replied, "To our knowledge, there are no others, Your Honor." Tr. at 8.

Thus, at the August hearing, the government insisted, upon repeated questioning, that the 1500 or so pages of documents which it had already produced were all of the documents that reflected upon the INS's decision to file deportation charges against the Six. The government insisted that any other materials "could have no bearing on the INS' decision to prosecute." Now, the government is attempting to introduce some 8500 additional pages of documents which, by its own admission, played no role in the decision to file deportation charges against the Six. The central question before the Court on the instant motions is whether there is prima facie evidence that the INS made that decision for an impermissible reason. This is the exact same question that the discovery at issue at the August hearing was intended to illuminate. Documents of which the INS was unaware at the time it made that decision cannot

possibly be relevant to the question of its motivation in making the decision.⁵

Therefore, the government would seem to be caught in a catch-22: either (1) the government was telling the truth at the August 16, 1995 hearing, and all of the 8500 pages of newly-submitted documents are irrelevant to the question of the INS's motivation in making the decision to deport the Six; or (2) the government was not telling the truth at the August 16 hearing, and some or all of the new 8500 pages might be relevant as to the Six.

In its papers, the government responds, albeit indirectly, by saying it "previously declined to submit this factual record because a variety of jurisdictional and other precedents convinced them that these aliens' claims in this Court should have been dismissed as a matter of law. Having failed to persuade this Court and the Ninth Circuit Court of Appeals on that point, defendants now comply with the Ninth Circuit's opinion in *AAADC v. Reno*, and, consistent with this Court's Amended Order of January 1994, address these aliens' claims of selective prosecution

⁵ At the April 8, 1996 hearing, the government noted that the document requests at issue at the August 16, 1995 hearing related only to the Six, not to the Two, and that there is thus no inconsistency between the government's 1500-page discovery production and its 10,000-page submission on the instant motions as to the Two. But the flipside of this would be that the 8500 new pages relate only to the Two. However, at the April 8 hearing, when asked whether it was conceding that the 8500 new pages are irrelevant as to the Six, the government demurred. In light of that, and of the fact that the 10,000-page submission is not differentiated according to whether it relates to the Two or to the Six or to all plaintiffs, the Court finds the government's explanation less than completely persuasive.

using a complete factual record." Def. Opp. at 3. In its reply, the government repeats this argument, contending that "[t]he new factual picture presented by the government's submission is the 'changed circumstances,' which, along with the effect these facts have on the applicable legal analysis, satisfy the legal requirements for dissolving the preliminary injunction granted earlier and for denying the additional injunction now sought by plaintiffs." Def. Reply at 9.⁶

⁶ It should be noted that this argument does not justify the government's filing of the instant motion to dissolve. "Changed circumstances" refers to matters outside a party's control, not changes in the party's litigation strategy. The latter is an improper reason to bring a motion to dissolve or modify an injunction. *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S. Ct. 460, 464 (1932) ("The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making"). "A motion to modify a preliminary injunction is meant only to relieve inequities that arise after the original order." *Favia*, 7 F.3d at 338. See also *Building and Constr. Trades Council v. NLRB*, 64 F.3d 880 (3d Cir. 1995). The substance of the government's new 10,000-page submission was available to the government at the time the preliminary injunction was entered; the government simply chose not to litigate the facts at that time. There have been no "(1) changes in operative facts, (2) changes in the relevant decisional law, [or] (3) changes in any applicable statutory law." 11A Wright, Miller & Kane, Fed. Prac. & Proc.: Civil 2d § 2961, at 402-03. The Court could thus deny the government's motion on the ground that it is "merely an untimely Rule 59(e) motion for reconsideration disguised as a motion to modify." *Id.* at 337. *Accord Transgo, Inc. v. Ajac Transmission Parts Corp.*, 911 F.2d 363, 365 (9th Cir. 1990) (party seeking modification of injunction must "show clearly a substantial change in circumstances or law since the orders were entered [and] extreme and unexpected hardship in compliance with the injunction's terms"); *Merrell-Nat'l Lab., Inc. v. Zenith Lab., Inc.*, 579 F.2d 786, 791-92 (3d Cir. 1978).

Like the government's argument that the Ninth Circuit's holding that *Healy* applies is not the law of the case, this argument is an irrelevant distraction. If the government thought it could successfully oppose plaintiffs' motion for a preliminary injunction on purely legal grounds, it was certainly entitled to rely on those grounds. But once the government lost on that motion, and the Court ordered it to produce to the Six all documents reflecting upon the decision to file the deportation charges, "purely legal" arguments about the applicable First Amendment standard had nothing to do with anything.

The government's implication in the above-quoted statement that it submitted this "complete factual record" because the Ninth Circuit ordered it to is also misleading. Nothing in *AAADC v. Reno* directed the government to submit documents which it had represented to this Court were irrelevant. Based on the discussion in the papers and the statements of Michael Lindemann at the April 8 hearing, the Court concludes that what the government means, but for obvious reasons is reluctant to say outright, is that the Ninth Circuit's rejection of its legal arguments forced it to change its litigation strategy. While this is understandable, it does not extricate the government from the catch-22 in which it currently finds itself mired.

The Court finds the government's conduct in this regard extremely troubling, but in view of the importance of the issue, the Court has considered the entire 10,000-page submission.

2. Most of the Government's Submission is Inadmissible or Irrelevant

Since the sheer volume of the submission precludes a document-by-document analysis, the Court will discuss a few of the recurring evidentiary problems plaguing the government's submission. The government states that it "submitted approximately 10,000 pages of factual material, substantial portions of which were at one time classified," Def. Reply at 1, but it continues to rely on unattributed hearsay from confidential sources. Much of what Knight and Markardt say in their declarations is based on information allegedly obtained from unidentified sources. See Pl. Reply at 14 & nn.19-20. Even if the sources were identified by name, Knight's and Markardt's accounts of what the sources told them would be inadmissible as hearsay. Where the sources are not identified, as plaintiffs point out, reliance on this "evidence" poses the same due process problems as prohibit the INS from relying on undisclosed classified information in a legalization proceeding. See *AAADC*, 70 F.3d at 1067-70.

The government's translations are extremely problematic. Most of the documents submitted, as well as the speeches recorded on the tapes of the fundraising dinners, are in Arabic. The government has not submitted a single declaration from any of its translators (often it does not even identify the translator), so there is no foundation for any of the translations. See Fed. R. Evid. 604. In addition, plaintiffs say that the government has not submitted the original Arabic materials for some of the translations it has submitted. This does not affect the Court's ability to evaluate the evidence, but plaintiffs ought to be able to

see the original Arabic documents in order to check the accuracy of the translations. *See* Pl. Reply at 16 & n.22.

Moreover, many of the government's translations are undated, so it is unclear whether they could have been made available to the INS in 1987 when it made the decision to deport plaintiffs. *See, e.g.*, Knight Exh. 30B. The government bears the burden of establishing the relevancy of its proffered evidence, so the Court should not admit any of the undated translations. Many of the translations that are dated were not prepared until 1990 or 1991, well after the decision to deport plaintiffs was made, so these translations could not have affected that decision and are thus clearly irrelevant. *See, e.g.*, Knight Exh. 26B.

Similarly, the transcript of the immigration proceedings involving plaintiffs (which consumes more than half of the 10,000-page submission) is irrelevant because it did not exist at the time the decision to deport plaintiffs was made and thus could not have been relied upon by the INS. The same is true of the declarations of Burleigh, Wilcox, and Bremer, government counter-terrorism officials who prepared declarations describing the history of the PFLP.⁷

⁷ At the April 8 hearing, the government conceded that the immigration transcript is irrelevant because it was not provided to the INS at the time it made the decision to deport plaintiffs. Apr. 8, 1996 Tr. at 23. The counter-terrorism officials' declarations are irrelevant for the additional reason that they relate only to the PFLP generally, rather than plaintiffs as individuals. Similarly, the Markardt declaration is irrelevant because it relates only to activities of the PLFP in New York, and has nothing to do with any of the plaintiffs.

The government offered no response whatever either in its papers or at the April 8, 1996 hearing to plaintiffs' arguments regarding the translations.

The government's only response to plaintiffs' hearsay charges is that since the Federal Rules of Evidence do not apply in a deportation proceeding, and hearsay is admissible in a deportation proceeding if it is probative and its use is not fundamentally unfair, the government should be able to rely on hearsay in this action to prove that it acted properly in instituting deportation proceedings against plaintiffs. The use of what would otherwise be hearsay information regarding the activities of plaintiffs would be permissible under Fed. R. Evid. 801(c) if such information were offered to establish the state of mind of the decisionmakers rather than the truth of the matter asserted, *i.e.*, that plaintiffs in fact did what is alleged. But the government does not assert that the information it seeks to introduce is offered for this purpose. It merely argues that because this case involves a deportation proceeding and hearsay is admissible in a deportation proceeding, that hearsay should be admissible here. Def. Reply at 9.

At the April 8 hearing, the government analogized the question whether the decision to deport plaintiffs violated their First Amendment rights to a determination whether probable cause existed for an arrest. In the latter context, because probable cause may be based on hearsay, hearsay is admissible to show the existence of probable cause. The Court need not resolve this issue, because as explained below, the proffered evidence does not show that any of the plaintiffs had the specific intent to further the unlawful aims of the PFLP.

3. *The Government's Submission Does Not Show that Plaintiffs Had the Specific Intent to Further the PFLP's Unlawful Aims*

Even if the Court gives the government the benefit of the doubt as to the discrepancy between its 1500-page document production and its 10,000-page submission (despite the weakness of the government's explanation), and even if the Court disregards the grave evidentiary problems afflicting much of the government's submission, the government faces a more fundamental problem: its submission does not show that any of the plaintiffs had the specific intent to further the illegal aims of the PFLP.

The government's case is based on information gathered from the surveillance of plaintiffs (principally Hamide), in particular as regards three fundraising dinners held in the Los Angeles area in 1985 and 1986. Nearly all of the rest of the government's submission relates only to the PFLP, not to plaintiffs. The first of the three dinners was held at St. Nicholas Cathedral in Los Angeles in February 1985. The second was held at the VFW Hall in San Bernardino in June 1985. The third was held at the Glendale Civic Auditorium in February 1986.

The government sums up what it apparently considers to be its strongest evidence at pages 30-31 of its opening brief: plaintiffs "(1) distributed Al Hadaaf on a commercial scale, collected subscriptions, presumably reimbursed the PFLP in Damascus for the cost of those subscriptions, and transported these shipments from the airport cargo facilities to Hamide's residence; (2) rented facilities for fundraising events; (3) arranged and provided security for PFLP events; (4) decorated, organized, catered, conducted, and cleaned

up after such events; (5) held leadership positions in the organization; (5) [sic] [6] furnished transportation to other PFLP leaders; (6) [sic] [7] attended high level PFLP meetings abroad (7) [sic] [8] ordered and arranged the attendance of other members at PFLP meetings abroad; and (8) [sic] [9] engaged in regular communications with other PFLP leaders in the United States." Def. Opp. at 30-31.

Notwithstanding the government's characterization of this conduct as "the concerted acts of an international terrorist conspiracy," *id.* at 31, none of the nine items constitutes evidence of any plaintiff's "specific intent to further the unlawful aims" of the PFLP.

a. *The Glendale Dinner*

The closest the government comes to the required evidence is in its recounting of the 1986 Glendale dinner. During the fundraising portion of that dinner, Hamide (who was acting as the MC) said: "Here the collection of contributions is mainly for the nation, for the combatants in Lebanon and on the West Bank." Knight Decl. at 47; Exh. 30B at 6. Hamide also said: "The oversight committee will take over now and will announce the total [unclear] and will see to that. They will supervise the sending of the donation to the homeland. I think that on the tables there is also information about last year's donations, that it was received in the homeland and this was confirmed by Al Hadaaf magazine." Knight Decl. at 48; Exh. 30B at 6. Finally, after an interlude of dancing and singing, Hamide said: "People, the revolution will not continue and the march to Palestine will not go with words alone. The revolution requires support. Those who cannot offer their lives, as do those who sacrifice

their lives daily, can at least offer support here to the heroes, the heroes who teach the enemy lesson after lesson." Knight Exh. 30B at 8. During this time, Ayman Obeid and Sharif walked around the room collecting checks from attendees and passing them up to the stage, and Shehadeh was on stage with Hamide.

Plaintiffs point out several problems with this evidence and provide additional evidence which puts the government's evidence into context. First, the above quotes are purported translations of remarks made in Arabic, which agents Knight and Gappert do not speak or understand. They taped the event, and had it translated later. But the tape was unclear at many parts during the fundraising portion, so the translation submitted is admittedly incomplete (only three minutes including inaudible parts, according to plaintiffs).⁸ Plaintiffs say that one part of the event not captured on the government's tape is the fact that "the solicitations were introduced with a call for assistance to those suffering in the refugee camps in Lebanon and the West Bank," and they submit

⁸ Moreover, it should be noted that it is far from clear that this translation was provided to the INS before it made the decision to deport plaintiffs. The translation is undated (as well as unsigned), and it was not included in the FBI report which was provided to the INS despite the fact that the FBI report discussed the Glendale dinner at great length. See Knight Dec., Exh. 45. Knight's declaration does not say anything about who made the translation, when it was made, or whether it was provided to the INS. See *id.* at 43-52. At the April 8 hearing, the government was unable to offer any evidence that the FBI presented this translation to the INS before the INS decided to deport plaintiffs. The government has thus not met its burden of establishing the relevancy of this translation.

supporting declarations from people in attendance at the event. See Decl. of Ibrahim, Alwan.

In addition, the government omits in its brief the fact recorded in its exhibits that in between the first two of Hamide's statements quoted above, Pierre Alwan, the president of US OMEN (an IRS-certified charitable organization that the government contends, with no evidence at all, is in reality a front for the PFLP's military operations), solicited in English contributions of furniture and other items to a thrift store run by US OMEN. Knight Exh. 30B at 6.

In the same regard, the government's own evidence shows that at the St. Nicholas event in 1985, the fundraising was expressly for the benefit of US OMEN. Hamide told attendees to make checks payable to US OMEN. Knight Decl. at ¶56. The declarations of Nasir, Ibrahim, Ajjawi, and Alwan corroborate this, and state that the donations solicited at the dinners were understood to be for humanitarian purposes only. The government has no evidence of what actually transpired at the San Bernardino VFW dinner in June 1985 (which Amer, not Hamide, ran), but it says that in advance of that dinner, the FBI received information that the fundraising to be conducted would be represented to the audience as for the benefit of "mothers and orphans of Palestinians in the Middle East." Knight Decl. at ¶83(d).

b. *The Healy "Specific Intent" Standard*

None of these statements proves that Hamide (much less any of the other seven plaintiffs) had the specific intent to further the unlawful aims of the PFLP. The reference to "combatants" is unimpressive, because as the government argues in a different context, all PFLP members are referred to as "com-

batants and supposedly bound by PFLP doctrine to be "combatants." See p. 26-27, *infra*. Obviously, most are not "combatants" in the sense the government is trying to pin on Hamide's statement. As plaintiffs point out, "combatants" could refer to all those who opposed or spoke out against the West Bank occupation, all those who opposed the peace process, or all those who participated in strikes in protest of the occupation. The same is true for "heroes who teach the enemy lesson after lesson."

In context, there is no reason to believe that these statements evince a specific intent to raise money for terrorism. Rather, the PFLP employed terms such as "combat" and "hero" broadly, as rhetorical flourishes, consistent with the Supreme Court's recognition that militant rhetoric goes with the territory of political speech by political minorities. See, e.g., *Watts v. United States*, 394 U.S. 705, 708, 89 S. Ct. 1399, 1401 (1969) ("The language of the political arena . . . is often vituperative, abusive, and inexact"). Indeed, the Supreme Court has extended the protection of the First Amendment to speech far more militant than what Hamide is alleged to have said. See *id.* at 706, 89 S. Ct. at 1400 ("if they ever make me carry a rifle the first man I want to get in my sights is L.B.J."); *Noto v. United States*, 367 U.S. 290, 298, 81 S. Ct. 1517, 1521 (1961) ("certain individuals hostile to the Party would one day be shot"). The government makes much of Hamide's statement that the money being collected was destined for "the homeland," but that statement in no way shows that the money would support illegal activities in "the homeland." The money could as easily have been destined for the refugee camps mentioned above, or for any of the

numerous other lawful activities engaged in by the PFLP.⁹

The Court's conclusion is confirmed by an examination of the Supreme Court's opinion in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409 (1982), its most recent treatment of these issues. That case involved a widespread and long-lasting boycott of white-owned stores in Port Gibson, Mississippi. One of the principal ways the boycott organizers achieved broad compliance with the boycott was by stationing "store watchers" and "Black Hats" outside the white-owned businesses to record the names of blacks that patronized them. In addition to the use of the lawful sanction of social ostracism to dissuade blacks from breaking the boycott the Court expressly noted that "some members of each of these groups engaged in violence or threats of violence." *Id.* at 926, 102 S. Ct. at 3432. Relying on this unlawful activity, the plaintiffs sought to impose liability on all individuals who were either store watchers or members of the Black Hats. The Court held that while the individuals who engaged in the unlawful activities could be liable, the individuals who associated with these two groups but did not personally engage in the unlawful activities carried out by some of their number could not be liable "absent a specific intent to further an unlawful aim embraced by that group." *Id.* at 925, 102 S. Ct. at 3432.

⁹ As plaintiffs stated at the April 8 hearing, it would not demonstrate a specific intent to further any unlawful activities to prove that the funds raised would be devoted exclusively to the PFLP's military activities. This is because the PFLP engages in legal military activities, such as defending refugee camps, as well as illegal military activities.

Just as “[t]here is nothing unlawful in standing outside a store and recording names” or “in wearing black hats, although such apparel may cause apprehension in others,” *id.*, there is nothing unlawful in distributing literature, recruiting new members, collecting money, or organizing dinner events, even if others find such literature or events alarming. And just as the Supreme Court in *Claiborne Hardware* refused to allow liability to attach by virtue of association with groups that engaged in unlawful activity, plaintiffs in the instant case cannot be deported for associating with an organization that engages in unlawful activity.

Because a “blanket prohibition of association with a group having both legal and illegal aims” would present ‘a real danger that legitimate political expression or association would be impaired,’” *id.* at 919, 102 S. Ct. at 3428 (quoting *Scales v. United States*, 367 U.S. 203, 229, 81 S. Ct. 1469, 1486 (1961)), the First Amendment requires “clear proof that a defendant ‘specifically intend[s] to accomplish [the aims of the organization] by resort to violence.’” *Scales*, 367 U.S. at 229, 81 S. Ct. at 1486 (quoting *Noto*, 367 U.S. at 299, 81 S. Ct. at 1522)).

The *Claiborne Hardware* Court noted that the Court in *Noto* had “emphasized that this intent must be judged ‘according to the strictest law,’ for ‘otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.’” *Claiborne Hardware*, 458 U.S. at 919, 102 S. Ct. at 3429 (quoting *Noto*, 367

U.S. at 299-300, 81 S. Ct. at 1521)). Here the government has simply not presented “clear proof” that any of the plaintiffs “specifically intend[ed] to accomplish [the unlawful aims of the PFLP] by resort to violence.”

The government’s response in this regard is, unfortunately, typical of its approach to this case: claiming the moral high ground while making misleading arguments. “The PFLP cannot remotely be compared to the NAACP. The NAACP never kidnapped and murdered an American Ambassador; it did not slaughter innocent American citizens at the Lod Airport” Def. Reply at 11. The entire point of freedom of association is that it doesn’t matter whether the PFLP can be compared to the NAACP, and it doesn’t matter whether the PFLP has done all these bad things and more. The point is that there is no evidence that any of the plaintiffs ever kidnapped, murdered, or slaughtered anyone, so “precision of regulation” is required to ensure they are not punished for their constitutionally protected activities. *Claiborne Hardware*, 458 U.S. at 916, 102 S. Ct. at 3427 (quoting *NAACP v. Button*, 371 U.S. 415, 438, 83 S. Ct. 328, 340 (1963)).

c. *The Government’s Other Evidence is Unpersuasive*

As the Court has stated above, the evidence regarding the Glendale dinner is the government’s strongest. For the sake of completeness, the Court will describe certain other evidence relied upon by the government as well. When one considers this additional evidence, the overall weakness of the government’s showing—despite the sheer enormity of its submission—becomes apparent.

A recurring feature of the government's submission is the making of conclusory assertions without any supporting evidence. For example, Knight's narration of the Glendale dinner includes statements such as: "It is obvious that this fundraiser has nothing to do with building hospitals or schools, it is solely for raising money for terrorist activities by the PFLP." Knight Exh. 30B at 1. Knight doesn't say exactly why he thinks this, but it appears to be because "[t]here are posters with people carrying AK 47s and standing behind anti tank howitzers." *Id.* Knight also says that "[t]he males are wearing fatigue shirts and camouflage fatigue pants, this would not be a normal attire for obtaining cash for orphans, it is one to get cash for guns." *Id.* Thus, instead of following the trail of the money collected at the Glendale dinner, the government simply advances the bald assertion that because the event had a militant tone, it must have been intended to support exclusively the PFLP's terrorist activities. There is no basis in logic or in the proffered evidence for this assertion.

Indicative of the government's scattershot, guilt by association approach is its statement of facts in its opening brief, which begins with the following: "Sisters and brothers we all know the revolution wants to transform dollars into bullets, the dollar into bombs, the dollar into a loaf of bread for a family in a hungry camp.... Therefore, I suggest putting this chain on auction. This way we change this chain to dollars. From dollars then we can transform it to bullets, and the bullets to kill Zionists in the occupied land. Let us start auctioning on this chain." Def. Opp. at 3. Unfortunately for the government, this alleged statement was made by an unidentified New York PFLP

leader, not any of the plaintiffs. It is thus hardly probative of plaintiffs' specific intent.¹⁰

The government is much exercised about the speech given by Jaber El-Wanni at the Glendale dinner. El-Wanni allegedly (the problems with the government's translations that the Court detailed above are present here as well) threatened Arabs who supported the Amman Accord, and named some names. One of those named was Nablus Mayor Zaphir Al Masri, who was assassinated a few weeks later. The PFLP, among other groups, claimed responsibility for the killing. *See* Knight Decl. at 45-46. The government argues that this gave it the right to prosecute plaintiffs for conspiracy or making threats.

As plaintiffs explain, "[t]here is no evidence that plaintiffs directed Mr. El-Wanni to make that statement, conspired with him, nor even that they were aware that he would make it. The only theory left for holding plaintiffs responsible for Mr. El-Wanni's statement is guilt by association, a theory forbidden by the First Amendment." Pl. Resp. at 2. The fact (if it is a fact) that El-Wanni threatened Al-Masri with plaintiffs present in no way proves that plaintiffs had the specific intent to further any unlawful activities.

Perhaps the most dubious of the government's many unpersuasive arguments is its claim that "PFLP doctrine mandates that every PFLP member be a combatant and binds all members to the positions taken by PFLP leaders. PFLP doctrine also holds that all PFLP activities are subordinate to the 'battle.' Knight Decl. at 13. To the committed PFLP

¹⁰ Similarly, the entire Markardt declaration relates to activities of the PFLP in New York, and has nothing to do with plaintiffs.

member, pulling a trigger is no different than selling a subscription to Al Hadaq, and soliciting money for the cause is the same as killing Zionists. Every act has a political message. Every utterance carries a terrorist purpose." Def. Opp. at 4.¹¹ Putting aside for the moment the sheer incredibility of this claim, the real issue, as plaintiffs point out, "is not whether these things are indistinguishable 'to the committed PFLP member,' but to the United States Constitution." Pl. Reply at 26. As the Supreme Court has observed, "men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles." *Aptheker v. Sec. of State*, 378 U.S. 500, 510, 84 S. Ct. 1659, 1666 (citation omitted).

It should also be noted that most of the evidence discussed in this Order relates mainly to Hamide, to a somewhat lesser extent to Shehadeh, and only indirectly to the Six. Plaintiffs' helpful summary of the evidence with respect to each of the Six (helpful because the government nowhere particularizes its evidence among the various plaintiffs) reveals that most of it is based on their association with Hamide. See Pl. Reply at 32-33 n.36. Thus, the Court's conclusion that the government has not demonstrated

¹¹ This presumably is the reason for the government's submission of many hundreds of pages of PFLP publications, such as "The Political and Organizational Strategy," published by the PFLP's Central Information Committee. The government quotes and underscores, as if it is somehow meaningful, the statement in this work that the "dialectical link between the battle and the political activity is a sound guide for our action" and that "[a]ll organization, political, informational, and financial efforts must be linked to the interests of the battle and not be at its expense." Def. Opp. at 4-5 n.4.

that Hamide or Shehadeh had the specific intent to further the unlawful aims of the PFLP applies a fortiori to the Six.

d. *The Government's Strict Scrutiny Argument*

The government argues that "[e]ven assuming that the conduct engaged in by these aliens is characterized as pure political 'advocacy' and the government action or regulation here is an infringement of these aliens' freedoms of association . . . the Supreme Court has declared that 'it is clear that 'neither the right to associate nor the right to participate in political activities is absolute.'"" Def. Opp. at 36 (citing *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)). In other words, selecting plaintiffs for deportation on the basis of First Amendment protected conduct does not automatically violate the First Amendment; it is subject to strict scrutiny as a content-based regulation of speech and association. The government thus argues that its action was narrowly tailored to further a compelling governmental interest.

At the April 8, 1996 hearing, plaintiffs argued that the considerations underlying the strict scrutiny standard are already incorporated into the *Healy* standard. More specifically, the argument goes, the Supreme Court held that the compelling governmental interest in stopping groups' unlawful activities may, in light of the protection to which associational conduct is entitled under the First Amendment, be furthered only by targeting those associators who have the specific intent to further the group's unlawful activities; targeting associators who lack this specific intent would be an insufficiently narrowly tailored method of regulation. The *Healy* rule would

thus constitute a context-specific application of strict scrutiny.

The Court agrees with plaintiffs. In *Claiborne Hardware*, the Supreme Court set forth the *Healy* standard and for support, then stated that “[i]n this sensitive field, the State may not employ ‘means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.’” 458 U.S. at 920, 102 S. Ct. at 3429 (quoting *Carroll v. Princess Anne*, 393 U.S. 175, 183-84, 89 S. Ct. 347, 353 (1968)). This indicates that *Healy* in effect is the strict scrutiny standard in the particular context of association with groups that engage in both lawful and unlawful activities. In addition, the Court has discovered no case in which the court has analyzed the issue as the government suggests: first find that a government regulation of associational activity is unjustified under *Healy* and then apply strict scrutiny to determine whether it can nonetheless be upheld. The absence of an explicit levels-of-scrutiny analysis is not worrisome or unusual, since (as the government argues in a different context, see Def. Opp. at 23-25), the Supreme Court often speaks without reference to levels of scrutiny in First Amendment cases. See e.g., *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994).

In any event, if strict scrutiny applies independent of the *Healy* test, the Court holds that the government’s action in deporting plaintiffs for their protected association with the PFLP fails such scrutiny. The government asserts that it has a compelling interest in stopping terrorism. It surely does. But if the government cannot prove that plaintiffs had the specific intent to further any terrorist activities, it cannot demonstrate that its deportation of plaintiffs

was a narrowly tailored action in furtherance of that interest.¹²

When questioned in this regard at the April 8 hearing, Lindemann, the government’s attorney, advanced the eye-opening contention that when the government has a compelling interest, it “can do pretty much what it wants to do.” Apr. 8, 1996 Tr. at 67. Not only is this contention utterly without a basis in law, but it is also quite disturbing to hear coming from the government as a justification for its conduct in a case where the plaintiffs have made a preliminary showing that the government in effect treated them as if it could do whatever it wanted.

Lindemann’s statement could be dismissed with the recognition that extemporaneous oral remarks tend naturally to suffer from imprecision and are not always intended to mean what they appear to say. But off-the-cuff oral remarks also often mean just what they say, even (or especially) if they weren’t intended to be said. The Court is more inclined to view Lindemann’s statement as an unintended but sincere product of the extemporaneous setting—a Freudian slip—given his argument to the same effect in his reply brief, in which he contended that because of the difficulty of this case, “the interests of the sovereign must weigh heavily.” Def. Reply at 8. It should not need to be said that in this as in every case, “the interests of the sovereign” are entitled only to so much deference as the law affords them. A demo-

¹² It would thus appear that the government could never pass strict scrutiny when it fails *Healy*, which is another reason to believe that strict scrutiny is embodied in the *Healy* standard and need not be separately analyzed in this case.

cratic government is constituted of, controlled by, and exists for, the people; it is their equal before the law.¹³

III. CONCLUSION

In light of all the foregoing, the Court holds that the government has failed to show that any of the plaintiffs had the specific intent to further the unlawful aims of the PFLP. This is what William Webster admitted years ago, and the government's 10,000-page submission confirms it. Therefore, plaintiffs' association with the PFLP was protected by the First Amendment. The Court has already found preliminarily that the Six have made out a *prima facie* case that this protected association was the government's motivation in selecting them for deportation and that others similarly situated were not so selected. The Court hereby reaffirms that finding, and denies the government's motion to dissolve the preliminary injunction as to the Six. For the same reasons as the Court found the Six had made out a *prima facie* case of discriminatory motive and disparate impact, the Court finds that the Two have done so as well. The Court therefore grants their renewed motion for a preliminary injunction.¹⁴

¹³ The Court recognizes that plaintiffs are not citizens of the United States, but as stated, under *AAADC v. Reno*, they are entitled to the same First Amendment rights as citizens.

¹⁴ In its reply, the government argues that it need not prove beyond a reasonable doubt that plaintiffs had the specific intent to further the PFLP's unlawful aims, but only meet the "evidentiary burden" "which would justify initiating a civil deportation proceeding." Def. Reply at 1. It is probably true, as the government argues, that to institute a deportation proceeding, the government need only have a *prima facie* case of deportability. But that is not the issue here. Plaintiffs do not contend that they are not deportable; the government clearly

On April 5, 1996, the government filed a motion for reconsideration of the Court's Order issued March 6, 1996 granting in part plaintiffs' motion to compel production of two memos which the government had claimed were privileged. Under Fed. R. Civ. P. 59(e), the government's motion is nearly three weeks late, and under Local Rule 7.16, it is improper because it does not set forth a ground for reconsideration. At the April 8, 1996 hearing, the government stated that its motion was filed last because it spent three weeks deciding whether to seek an interlocutory appeal, to

had evidence that various of the plaintiffs advocated "world communism," 8 U.S.C. § 1251(a)(6)(D), or were out of status, 8 U.S.C. § 1251(a)(2). What plaintiffs contend is that the government decided to act on this evidence of deportability to deport them, while not acting on similar evidence to deport similarly situated others, because of plaintiffs' association with the PFLP. If this is true, it would constitute selective enforcement in violation of the First Amendment regardless of plaintiffs' statutory deportability. To prevail on the instant motions, the government must show that the conduct by plaintiffs that motivated it to deport them was not protected by the First Amendment. The Court has concluded that the conduct which plaintiffs have preliminarily shown to have motivated the government was protected by the First Amendment. The Court need not address the question at what level of proof the government must demonstrate specific intent under *Healy* or its own motivation, because there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims. Moreover, this is not what the government believed at the time; it believed instead that it could deport plaintiffs merely for associating with the PFLP, even though if plaintiffs "had been United States citizens, there would not have been a basis for their arrest." Webster Testimony, *supra*, at 95. Indeed, the government continued to adhere to this position until the Ninth Circuit rejected it in *AAADC v. Reno*.

comply with the March 6 Order and seek to redact parts of the two memos, to seek reconsideration, or to take other action. Needless to say, this is not a valid excuse for failing to comply with the time limits of Rule 59(e), and is no excuse whatever for simply ignoring this Court's March 6 Order, which directed the government either to produce the two memos to plaintiffs or to submit its proposed redactions by March 25, 1996. The Court believes the government's blatant disobedience of the March 6 Order to be sanctionable. Nevertheless, as stated at the April 8 hearing, in view of the importance of the privilege issue, the Court will consider the government's motion. However, the Court wishes to make it clear to the parties that it will tolerate no such conduct in the future. In addition, plaintiffs filed on April 8, 1996 a request for reconsideration of the Court's Order issued March 25, 1996 denying plaintiffs' motion for attorney's fees. This request was thus also untimely. While the Court will consider plaintiffs' request as well, the Court hereby warns the parties that such indulgence will not continue indefinitely.

IT IS SO ORDERED.

DATED: 4/25/96

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

Nos. 94-55405, 94-55444 AND 95-55177

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE;
ARAB AMERICAN DEMOCRATIC FEDERATION;
ASSOCIATION OF AMERICAN UNIVERSITY GRADUATES;
IRISH NATIONAL CAUCUS; PALESTINE HUMAN RIGHTS
CAMPAIGN; LEAGUE OF UNITED LATIN AMERICAN
CITIZENS; MICHAEL BOGOPOLSKY; DARREL MEYERS;
SOUTHERN CALIFORNIA INTER-FAITH TASK FORCE ON
CENTRAL AMERICA; AIAD KHALED BARAKAT; KHADER
MUSA HAMIDE; NUANGUGI JULIE MUNGAI; AMJAD
MUSTAFA OBEID; AYMAN MUSTAFA OBEID; NAIM NADIM
SHARIF; MICHAEL IBRAHIM SHEHADEH; BASHAR AMER;
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS;
FUND FOR FREE EXPRESSION; AMERICAN FRIENDS
SERVICE COMMITTEE, PLAINTIFFS-APPELLANTS

v.

JANET RENO, IN HER CAPACITY AS ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA, ET AL.; ERNEST E.
GUSTAFSON, DISTRICT DIRECTOR; IMMIGRATION &
NATURALIZATION SERVICE, DEFENDANTS-APPELLEES

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE;
ARAB AMERICAN DEMOCRATIC FEDERATION;
ASSOCIATION OF AMERICAN UNIVERSITY GRADUATES;
IRISH NATIONAL CAUCUS, ET AL.,
PLAINTIFFS-APPELLEES

v.

JANET RENO; DORIS MEISSNER; HAROLD EZELL; C.M.
McCULLOUGH, ET AL., DEFENDANTS-APPELLANTS

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE;
 ARAB AMERICAN DEMOCRATIC FEDERATION;
 ASSOCIATION OF AMERICAN UNIVERSITY GRADUATES;
 IRISH NATIONAL CAUCUS; AIAD BARAKAT;
 NAIM SHARIF, ET AL., PLAINTIFFS-APPELLEES

v.

JANET RENO; DORIS MEISSNER; HAROLD EZELL;
 GUSTAVO DE LA VINA; ERNEST E. GUSTAFSON;
 RICHARD K. ROGERS, DISTRICT DIRECTOR;
 IMMIGRATION & NATURALIZATION SERVICE,
 DEFENDANTS-APPELLANTS

Argued and Submitted April 7, 1995

Decided Nov. 8, 1995

D.W. NELSON, Circuit Judge:

This opinion decides three cases that have been consolidated on appeal. Two of the cases involve claims of selective enforcement¹ of immigration laws in violation of the aliens' First Amendment rights, arising from the initiation of deportation proceedings under various provisions of the Immigration and Nationality Act ("the INA"), codified as amended at 8 U.S.C. § 1101 *et seq.* (1994), against Aiad Khaled Barakat, Naim Nadim Sharif, Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, and Amjad Mustafa Obeid (No. 94-55444, collectively referenced as "the Six"); and Khader Musa Hamide and Michael Ibrahim Shehadeh (No. 94-55405, collectively referenced as "Hamide and Shehadeh"). In No. 94-55444, the Attorney General and the Immigration and

¹ A selective enforcement claim is the immigration equivalent of a criminal selective prosecution claim.

Naturalization Service appeal the grant of a preliminary injunction against further deportation proceedings for the Six. In No. 94-55405, Hamide and Shehadeh appeal the district court's denial of a similar preliminary injunction based on lack of subject matter jurisdiction. In the third case, No. 95-55177, the INS appeals the district court's finding of a due process violation and its grant of a permanent injunction prohibiting the INS' use of undisclosed classified information against Barakat and Sharif in adjustment-of-status legalization proceedings pursuant to Section 245a of the Immigration Reform and Control Act of 1986 ("the IRCA"), Pub. L. 99-603, 100 Stat. 3394 (Nov. 6, 1986), codified as amended at 8 U.S.C. § 1255a (1994). We have jurisdiction to review orders granting or denying a preliminary injunction under 28 U.S.C. § 1292(a) (1) (1988) and jurisdiction to review the district court's final order granting a permanent injunction under 28 U.S.C. § 1291 (1988). We affirm the grant of a preliminary injunction against the INS in the proceedings to deport the Six, we affirm the grant of a permanent injunction against the INS preventing the use of undisclosed classified information against Barakat and Sharif in their legalization proceeding, and we vacate the district court's decision that it lacked jurisdiction to consider the selective enforcement claim of Hamide and Shehadeh and remand for the district court to address that claim on the merits.

FACTUAL AND PROCEDURAL BACKGROUND

After initiating deportation proceedings, the INS arrested the eight named aliens in this case in January 1987. They were detained for several weeks in maximum security prisons and then released

pending the outcome of deportation proceedings. The INS charged all but Mungai under various provisions of the McCarran-Walter Act of 1952 ("the 1952 Act")² for membership in an organization, the Popular Front for the Liberation of Palestine ("PFLP"), that allegedly advocates the doctrines of world communism. In

² The provisions of the 1952 Act provided in relevant part for the deportation of

- (D) Aliens . . . who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship . . . ;
- (F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity, or propriety, of the unlawful assaulting or killing of any [government] officer or officers . . . ; or (iii) the unlawful damage, injury, or destruction of property; or (iv) sabotage;
- (G) Aliens who write or publish, . . . or knowingly cause to be circulated, distributed, printed, published, or displayed, . . . any written or printed matter, advocating or teaching [the doctrines and activities prohibited in sections F and D];
- (H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision. 8 U.S.C. §§ 1251(a)(6)(D), (F), (G), (H) (1988).

addition, the Six were charged with non-ideological immigration violations under 8 U.S.C. § 1251(a)(2) (1988) (overstaying a visa). Amer was also charged under 8 U.S.C. § 1251(a)(9) (1988) (failing to maintain student status). Later, charges were added for both Ayman Obeid and Amjad Obeid for changing their nonimmigrant status by taking unauthorized employment. In February, 1987, Mungai was also charged under the McCarran-Walter Act, 8 U.S.C. § 1251(a)(6) (D), (G), and (H).

In April 1987, the individual plaintiffs and several organizations initiated an action for damages, a declaration that the provisions of the 1952 Act under which the eight were charged are unconstitutional facially and as applied, and injunctive relief against the investigation, arrest, and deportation of aliens pursuant to the challenged provisions. On April 23, 1987, just four days before the district court's hearing on a motion for a preliminary injunction, the INS dropped the 8 U.S.C. § 1251(a)(5) ideological charges against the Six, but it retained the non-ideological, technical violation charges. The INS also dropped the original charges against Hamide and Shehadeh; but on April 28, 1987, it brought new charges against them under 8 U.S.C. § 1251(a)(6)(F)(iii), alleging that they were deportable as members of an organization that advocates or teaches the unlawful destruction of property. Later, the INS added a charge under 8 U.S.C. § 1251(a)(6)(F)(ii), alleging that Hamide and Shehadeh were associated with a group that advocates the unlawful assaulting or killing of government officers.

In April and May of 1987, former FBI director William Webster testified to Congress that "[a]ll of them were arrested because they are alleged to be

members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation . . . in this particular case if these individuals had been United States citizens, there would not have been a basis for their arrest." *Hearings before the Senate Select Committee on Intelligence on the Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong., 1st Sess. 94, 95 (April 8, 9, 30, 1987; May 1, 1987). Also, at a press conference after the original charges were dropped against the Six, INS Regional Counsel William Odencrantz indicated that the change in charges was for tactical purposes and that the INS intends to deport all eight plaintiffs because they are members of the PFLP.

The district court issued orders on May 21, 1987 and June 3, 1987 holding that it had no jurisdiction over the 1952 Act claims of Hamide and Shehadeh on ripeness grounds. Hamide and Shehadeh unsuccessfully sought review of the statute by mandamus. *Hamide v. United States District Court*, No. 87-7249 (9th Cir. Feb. 24, 1988). When they again sought review in the district court, it found that their facial and as-applied constitutional challenges to the statute were not justiciable. *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060, 1064. (C.D. Cal. 1989), *aff'd in part, rev'd in part*, *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 511 (9th Cir. 1991). Ruling on the claims of the Six, the district court found the challenged statutory provisions unconstitutionally overbroad. 714 F. Supp. at 1083-84. On review, the Ninth Circuit reversed the district court's holding on ripeness grounds. 970 F.2d at 510-12.

On April 5, 1991, after the repeal of the 1952 Act, the INS instituted new proceedings against permanent resident aliens Hamide and Shehadeh under the "terrorist activity" provision of the Immigration Act of 1990 ("the IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), codified as amended at 8 U.S.C. § 1251(a)(4)(B) (1994) (rendering deportable "[a]ny alien who has engaged, is engaged, or at any time after entry engages in terrorist activity (as defined in Section 1182(a))").³ The status of the charges under the 1952 Act is not clear: the Government has asserted at different times that the prior charges and proceedings under that Act remain pending concurrent with the new proceedings, or that the new charges "amended" the basis of the deportation proceedings so that the "terrorist activity" charges are the only ones currently pending.

All eight aliens then filed suit in district court claiming that the INS had singled them out for selective enforcement of the immigration laws based on the impermissible motive of retaliation for constitutionally protected associational activity. On January 7, 1994, however, the district court granted summary judgment to the Government on Hamide's and Shehadeh's selective enforcement claim, finding that it lacked jurisdiction. At the same time, the

³ The IMMACT defines "engage in terrorist activity" as:

to commit, in an individual capacity or as a member of an organization, an act of terrorist activity or an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity at any time.

⁸ U.S.C. § 1182(a)(3)(B)(iii) (1994).

district court granted a motion for further discovery and a preliminary injunction against further deportation proceedings in the case of the Six.

Meanwhile, in June of 1987, Barakat and Sharif applied for legalization under the IRCA. In 1991, they received Notices of Intent to Deny because the INS, using undisclosed classified information, considered them excludable under former 8 U.S.C. § 1182(a)(28)(F).⁴ Barakat and Sharif filed suit in district court challenging the use of classified information on several grounds, including a due process claim. The district court found that it had jurisdiction, and it issued a preliminary injunction against the confidential use of classified information. Following an *in camera*, *ex parte* examination of materials provided by the INS, the court concluded that use of the undisclosed information against Barakat and Sharif would constitute a due process violation, and it granted a permanent injunction against its use on January 24, 1995.

⁴ The former provision excluded:

Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (ii) the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers (either of specific individuals or of officers generally) of the Government of the United States or of any other organized government, because of his or their official character; or (iii) the unlawful damage, injury, or destruction of property.

8 U.S.C. § 1182(a)(28)(F).

DISCUSSION

I. JURISDICTION

As a threshold matter, we must determine whether the district court had jurisdiction to adjudicate these challenges to the INS' discretionary decisions and procedures. We review *de novo* the district court's decision regarding its subject matter jurisdiction. *Naranjo-Aguilera v. INS*, 30 F.3d 1106, 1109 (9th Cir. 1994).

A. SELECTIVE ENFORCEMENT CLAIMS

"To succeed on a selective prosecution claim, the defendant bears the burden of showing both 'that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive.'" *United States v. Bourgeois*, 964 F.2d 935, 938 (9th Cir.) (quoting *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir. 1983), *aff'd*, 470 U.S. 598 (1985)), *cert. denied*, 506 U.S. 901, 113 S. Ct. 290, 121 L.Ed.2d 215 (1992).

1. *The Six Nonimmigrant Aliens*

The Government argues that the district court lacked jurisdiction because the aliens' claim of selective enforcement can be reviewed directly by the court of appeals only upon review of a final order of deportation. We disagree.

a. *The Statutory Scheme for Judicial Review*

Section 106 of the INA, as amended, provides exclusive judicial review in the courts of appeals for "all final orders of deportation" after exhaustion of "administrative remedies available to [the petitioner]

as of right." 8 U.S.C. §§ 1105a(a), (c) (1994).⁵ Discretionary "determinations made during an incident to the administrative proceeding . . . and reviewable together by the Board of Immigration Appeals . . . are likewise included within the ambit of the exclusive jurisdiction of the Courts of Appeals under § 106(a)." *Foti v. INS*, 375 U.S. 217, 229, 84 S. Ct. 306, 313-14, 11 L.Ed.2d 281 (1963). However, because of the need for a factual record beyond that which can be

⁵ The section provides, in relevant part:

(a) Exclusiveness of procedure[:] The procedure prescribed by, and all the provisions of chapter 158 of Title 28 [the Hobbs Act,] shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under Section 1252(b) of this title, or comparable provisions of any prior Act, *except* that . . . (4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based . . . [and] (5) whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States . . . the court shall . . . (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court . . . for hearing de novo of the nationality claim. . . .

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. . . .

8 U.S.C. §§ 1105a(a), (c) (1994) (emphasis added).

cannot review many discretionary decisions of the INS as part of our review of a final deportation order. *See, e.g., Abedi-Tajrishi v. INS*, 752 F.2d 441, 443 (9th Cir. 1985) (finding no jurisdiction to review a discretionary decision when factual development is necessary); *Mohammadi-Motlagh v. INS*, 727 F.2d 1450, 1451, 1452 (9th Cir. 1984) (finding no jurisdiction for appellate review when the immigration judge and the Board of Immigration Appeals lack jurisdiction to review a district director's discretionary decision). When the provision for exclusive review in the courts of appeals is inapplicable, jurisdiction lies in the district court pursuant to the federal question statute, 28 U.S.C. § 1331, and pursuant to the general grant of power to review matters arising under the immigration laws, 8 U.S.C. § 1329. *See Cheng Fan Kwok v. INS*, 392 U.S. 206, 210, 88 S.Ct. 1970, 1973, 20 L.Ed.2d 1037 (1968); *Karmali v. INS*, 707 F.2d 408, 409 (9th Cir. 1983).

The decision to institute deportation proceedings, the basis for a selective enforcement claim, is a discretionary decision of the INS director that is not subject to review by either the immigration judge ("IJ") or the Board of Immigration Appeals ("BIA"). *See Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977). Both the IJ conducting the deportation proceeding and the Government agree that neither the IJ nor the BIA has jurisdiction to consider a selective enforcement claim during a deportation proceeding. Thus, we conclude that selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order.

The Government's argument that the selective enforcement claim in this case is "purely legal" and thus reviewable only in the court of appeals is unper-

suasive. Both prongs of the selective enforcement claim—disparate impact and discriminatory intent—require factual proof. See *United States v. Armstrong*, 48 F.3d 1508, 1513 (9th Cir. 1995) (en banc), cert. granted, — U.S. —, 116 S.Ct. 377, 133 L.Ed.2d 301 (1995). The district court ordered discovery and reviewed evidence from the aliens and from the Government that would not be available in a deportation proceeding. The aliens have submitted to the district court more than 450 pages of declarations, exhibits, and transcripts in support of their claims. In the course of factual development, for example, the INS has conceded that Amer is the only alien that the Los Angeles INS office has sought to deport for taking too few credits as a student, even though many such students have been reported to the INS. We therefore find that the district court had jurisdiction to consider these selective enforcement claims.

b. *The Government's Counterarguments*

The Government offers three additional arguments to defeat district court jurisdiction. First, it suggests that a selective enforcement claim in the immigration context is inappropriate, because the decision to enforce the immigration laws is a non-justiciable political question involving foreign policy decisions that are immune from judicial review. Second, the Government claims that if such claims are viable, the statutory scheme provides alternative mechanisms for review in the agency or the appellate courts. Third, the Government argues that even though discretionary claims fall outside the statutory provision for exclusive review and exhaustion, we should decline jurisdiction to consider these claims

on prudential ripeness grounds. We consider each of these arguments in turn.

(1) *Political Question*

The Government contends that the courts cannot consider an alien's selective enforcement claim because the Government's discretionary decision implicates foreign policy concerns that are non-justiciable political questions. See, e.g., *Baker v. Carr*, 369 U.S. 186, 208-213, 82 S.Ct. 691, 705-708, 7 L.Ed.2d 663 (1962) (discussing foreign policy issues as a basis for the political question doctrine).

There is, however, clear precedent for judicial recognition of selective enforcement claims. Although alienage classifications are closely connected to matters of foreign policy and national security, see, e.g., *Plyler v. Doe*, 457 U.S. 202, 219 n.19, 102 S.Ct. 2382, 2395 n.19, 72 L.Ed.2d 786 (1982); *Fiallo v. Bell*, 430 U.S. 787, 796, 97 S.Ct. 1473, 1480, 52 L.Ed.2d 50 (1977), "the judicial branch may examine whether the political branches have used a foreign policy crisis as an excuse for treating aliens arbitrarily," *Shahla v. INS*, 749 F.2d 561, 563 n.2 (9th Cir. 1984); see also *Yassini v. Crosland*, 618 F.2d 1356, 1360 (9th Cir. 1980) (noting that "serious questions might arise" if the INS disregarded constitutional protections). "[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine." *INS v. Chadha*, 462 U.S. 919, 942-43, 103 S.Ct. 2764, 2779-80, 77 L.Ed.2d 317 (1983). Thus, we can and do review foreign policy arguments that are offered to justify legislative or executive action when constitutional rights are at stake. *Id.* Contrary to the

Government's suggestion, the foreign policy powers which permit the political branches great discretion to determine which aliens to exclude from entering this country do not authorize those political branches to subject aliens who reside here to a fundamentally different First Amendment associational right. *See, e.g., Landon v. Plasencia*, 459 U.S. 21, 25-26, 103 S. Ct. 321, 325-326, 74 L.Ed.2d 21 (1982) (explaining the difference between exclusion of an alien upon initial entry and deportation of aliens who have been in the country); *see also Charles D. Weisselberg, The Exclusion and Detention of Aliens: Lessons From the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. Pa. L. Rev. 933, 939-47 (noting that the power of exclusion stems from the sovereign power of the federal government over its territory). If we were to decline jurisdiction on this basis, we would, in essence, proclaim that the courts have no essential function in ensuring that aliens are not targeted by the INS in retaliation for exercising their acknowledged constitutional rights, and we would allow those rights to be forfeited without redress. Clearly, the foreign policy powers of the political branches do not extend that far.

(2) *Alternative Mechanisms for Review*

We also reject the Government's assertion that the Hobbs Act provisions provide a mechanism by which the courts of appeals may assume jurisdiction over factual issues for which a record cannot be developed in regular INS proceedings. *See* 28 U.S.C. § 2347(c) (allowing remand to the agency for factual development); 28 U.S.C. § 2347(b)(3) (allowing transfer to a district court for a de novo trial on an ancillary

matter). First, the remand provision is not applicable in this instance. *See, e.g., Ramirez-Gonzalez v. INS*, 695 F.2d 1208, 1213 (9th Cir. 1983) (finding that § 2347(c) is inapplicable to INS proceedings, because the regulations provide a means to petition to the BIA to reopen the proceedings, in its stead); *Ghorbani v. I.N.S.*, 695 F.2d 784, 787 n.4 (9th Cir. 1982) (finding that § 1105a(4), which requires judicial review of the administrative record, precludes application of the Hobbs Act provision for remand on matters for which the agency lacks jurisdictional authority).

Second, because § 1105a allows transfer to a district court exclusively for de novo review of citizenship claims, the general transfer provision available elsewhere under the Hobbs Act does not apply in the immigration context. Compare 8 U.S.C. §§ 1105a(a)(5), (7) with 28 U.S.C. § 2347(b)(3). Even those circuits that disagree with this circuit's interpretation that remand under § 2347(c) is not available have declined to apply § 2347(b)(3) to authorize a transfer under § 1105a to a district court for claims not addressable before the IJ and BIA. *See, e.g., Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977).

The Government mistakenly relies on *Public Util. Comm'r of Oregon v. Bonneville Power Admin.*, 767 F.2d 622 (9th Cir. 1985), which held that the courts of appeals have exclusive jurisdiction of actions challenging the constitutionality of administrative proceedings under an act regulating utility rates. *Id.* at 624-25. That case involved a question of the breadth of the statutorily mandated jurisdiction, where the wording of the statute was much broader than the INS statute in the present case. *See id.* at 625-26. The statutory jurisdictional mandate in § 1105a is narrower and, in appropriate instances,

permits equitable relief in the district court for constitutional and procedural challenges. See *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 484, 494, 111 S.Ct. 888, 892, 897, 112 L.Ed.2d 1005 (1991) (interpreting § 1105a in the IRCA context to find district court jurisdiction to hear constitutional and statutory challenges to INS procedures when meaningful judicial review of the statutory and constitutional claims otherwise would be foreclosed).

(3) *Ripeness*

The Government also argues that this court should find that the district court lacked jurisdiction to hear these selective enforcement claims because of prudential ripeness concerns that are relevant to its jurisdiction to grant equitable relief. In *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), the Supreme Court established a two-pronged framework for ripeness analysis in the administrative agency context: courts should consider the fitness of the issues for judicial review and the hardship to the parties involved. *Id.* at 148-49, 87 S. Ct. at 1515-16. The "core principle" is that statutory requirements should not be construed to cause "irreparable injuries to be suffered" or the loss of "crucial collateral claims." *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11, 96 S.Ct. 893, 900-01 n.11, 47 L.Ed.2d 18 (1976). We therefore agree with the Six that their claim is ripe for review, because (1) the chill to their First Amendment rights is an irreparable injury that cannot be vindicated by post-deprivation review and (2) exhaustion through the deportation proceeding would be futile, in that the IJ and BIA cannot consider and develop facts about INS'

enforcement policies, practices, or motives, which are not subject to change through further agency interpretation.

(a) *Hardship*

The Supreme Court's overbreadth doctrine rests on the proposition that an overbroad statute has a chilling effect on First Amendment rights that cannot be vindicated through the normal channels of defense to a prosecution: that is, the legal and practical value of the First Amendment right may be destroyed if not vindicated before trial. See *Dombrowski v. Pfister*, 380 U.S. 479, 486-89, 85 S. Ct. 1116, 1120-22, 14 L.Ed.2d 22 (1965). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L.Ed.2d 547 (1976). Courts thus grant extraordinary relief because "[j]oining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection" so that "the duration of a trial is an 'intolerably long' period during which to permit the continuing impairment of First Amendment rights." *In re Asbestos School Litigation (Pfizer Inc. v. The Honorable James T. Giles)*, 46 F.3d 1284, 1294 (3d Cir. 1994). Even in the context of state criminal prosecutions, where federalism concerns raise additional barriers to the federal courts' exercise of equitable jurisdiction, federal courts refuse to abstain in cases involving a bad faith prosecution that has little expectation of a valid conviction or is initiated to retaliate for or discourage the exercise of consti-

tutional rights. *See, e.g., Lewellen v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988) (finding that the district court need not abstain when state prosecutors brought charges against an African American attorney in retaliation for his exercise of constitutional rights), *cert. denied*, 489 U.S. 1033, 109 S. Ct. 1171, 103 L.Ed.2d 229 (1989). We find that the perpetual threat of deportation based on group affiliation constitutes the kind of irreparable injury that is relevant to the ripeness inquiry here.

(b) *Fitness*.

We also agree with the Six that exhaustion would be a futile exercise because the agency does not have jurisdiction to review a selective enforcement claim. *Lopez-Telles*, 564 F.2d at 1304. "If the agency lacks authority to resolve the constitutional claims, there is little point to requiring exhaustion." *Xiao v. Barr*, 979 F.2d 151, 154 (9th Cir. 1992). Furthermore, we customarily decline to apply the prudential ripeness doctrine when exhaustion would be a futile attempt to challenge a fixed agency position. *See, e.g., El Rescate Legal Serv. v. Executive Office of Immigration Review*, 959 F.2d 742, 747 (9th Cir. 1991). Other circuits have similarly found exhaustion futile unless "there is genuine doubt as to what is going to happen in the administrative process." *Rafeedie v. I.N.S.*, 880 F.2d 506, 514 (D.C. Cir. 1989).

Contrary to the Government's assertion, our earlier opinion in this case is not dispositive here. *See American-Arab Anti-Discrimination Committee*, 970 F.2d at 510-12. We held that prudential concerns weighed against the district court's assuming jurisdiction of the unconstitutional-as-applied challenge

to the 1952 Act, because the factual record developed in the agency proceeding to support the application of the statute would assist our review of that claim. *Id.* at 510-511. In contrast, this case does not involve a facial or as-applied challenge to a statute. These selective enforcement claims are not moot now, and the speculative possibility that they may be rendered moot in the future is not sufficient to require futile exhaustion of administrative remedies. Therefore, we hold that the district court properly exercised jurisdiction over the nonimmigrant aliens' selective enforcement claims.

2. *The Permanent Resident Aliens, Hamide and Shehadeh*

The two permanent resident aliens, Hamide and Shehadeh, also contend that the district court had jurisdiction to consider their selective enforcement claims. Unlike the Six, Hamide and Shehadeh have been charged solely under provisions, in both the 1952 Act and the IMMACT, that are based on affiliation with disfavored political organizations. Because the posture in which their claims are presented is different from that of the claims of the Six, we consider them separately.

The basis for jurisdiction over Hamide's and Shehadeh's claims is essentially the same as that found to support district court jurisdiction for the Six. The exclusive mechanism for judicial review of a final deportation order does not provide a means of review of a selective enforcement claim for which the IJ and BIA lack adjudicatory authority. *See the discussion in Part I.A.1.a. supra.* Although the Government asserts that no factual development is

necessary beyond that which the Government will provide in the deportation proceeding as part of its case under the IMMACT, the agency proceeding cannot develop a factual record regarding patterns and practices of the INS treatment of aliens who may be similarly situated supporters of lawful activities of alleged terrorist organizations. *Id.* Thus, the legal arguments in Part I.A.1.a. apply as well to Hamide and Shehadeh: their selective enforcement claims can be considered only in the district court.

The Government argues—and the district court ultimately agreed—that the ripeness concerns relevant to these claims are different because the motive for targeting Hamide and Shehadeh cannot be considered truly pretextual, in that both the 1952 Act and the IMMACT provisions under which they are currently charged treat some aspect of affiliation as a basis for deportation. The Government essentially argues that the legal issue addressed in the deportation proceeding—how the IMMACT's terrorist activity provisions should be interpreted and whether the aliens' actions satisfy those requirements—is the same issue that must be addressed, under the second prong of the selective enforcement claim, to determine whether the Government unconstitutionally has singled out these aliens on the basis of an impermissible motive of retaliation for exercise of their First Amendment rights.

We conclude that the claim that Hamide and Shehadeh assert here is broader than that which they may raise in a defense of deportation. The legal issue that the IJ and the BIA will address is whether the aliens' actions satisfy the requirements of the IMMACT's terrorist activity provisions; however, the issue underlying the selective enforcement claim

of impermissible motive is whether the support of lawful activities of a disfavored organization that may also engage in unlawful terrorist activities provides a constitutional basis for deportation of a permanent resident alien. The selective enforcement claim necessarily imposes a different focus and requires the court to consider patterns of INS prosecutions rather than a particular application of a statute. *Montes v. Thornburgh*, 919 F.2d 531, 535 (9th Cir. 1990) (finding § 1105a inapplicable to suits alleging a pattern and practice of constitutional violations).

We hold, therefore, that the district court erred in declining jurisdiction on ripeness grounds, and we remand for further proceedings in accord with this decision.

B. CLASSIFIED INFORMATION CLAIM

In 1986, Congress amended the immigration laws to allow legalization of undocumented aliens who had entered the country before January 1, 1982. IRCA, Pub. L. 99-603 § 201(a), 100 Stat. 3394 (Nov. 6, 1985), as amended and codified in 8 U.S.C. § 1255a (amending the Immigration and Nationality Act by adding Section 245a regulating adjustment of status). The act established exclusive jurisdiction in the courts of appeals for judicial review of denials of legalization on review of final orders of deportation. 8 U.S.C. § 1255a(f)(4).⁶

⁶ The judicial review provision states, in relevant part:

(A) Limitation to review of deportation[:] There shall be judicial review of such a denial only in the judicial review of an order of deportation under Section 1105a of this title. (B) Standard for judicial review[:] Such judicial review shall be based solely upon the administrative record established at the time of the

1. *The Statutory Grant of Exclusive Jurisdiction*

The Government argues that Barakat and Sharif are challenging an individual determination in a legalization proceeding, and thus must exhaust their administrative remedies by undergoing the deportation proceeding before they are entitled to judicial review of their claim that use of undisclosed classified information to evaluate adjustment-of-status applications violates due process. Because the agency proceeding will not address the due process claim, however, the statutory exhaustion provision does not require the aliens to present their challenge to this INS practice through the exclusive review mechanism for final orders of deportation. See *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 483-84, 111 S. Ct. 888, 891-92, 112 L.Ed.2d 1005 (1991) ("HRC") (permitting district court consideration of claims that the INS engaged in unconstitutional procedural practices relating to acceptance of legalization applications). Barakat's and Sharif's due process claim is not unlike the due process violations that the Court found justiciable in HRC, which included routine, arbitrary denial of applications that were not supported by payroll records, maintenance of a secret list of employers whose supporting affidavits were routinely discredited, failure to provide interpreters at interviews, and failure to record or transcribe interviews. See *id.* at 489 n. 9, 111 S. Ct. at 894 n.9. Such due process violations concern the implementation of practices to carry out the legalization program, rather than an

review by the appellate authority. 8 U.S.C. § 1255a(f)(4).

"individual [eligibility] determination." See *id.* at 498, 111 S.Ct. at 899. "Nor would the fact that they prevail on the merits of their purportedly procedural objections have the effect of establishing their entitlement to [adjustment of] status." *Id.* at 495, 111 S. Ct. at 897. Thus, the aliens are not challenging the particular outcome of the application, but the collateral procedure of using undisclosed classified information that the INS deems generally available in processing legalization applications. See *id.* at 492, 111 S. Ct. at 896; *Campos v. Nail*, 940 F.2d 495, 497 (9th Cir. 1991) (finding jurisdiction when the plaintiffs "do not seek the determination of the merits of any individual deportation order, but challenge a judge's blanket policy on constitutional grounds"). Therefore, we conclude that the statutory grant of exclusive appellate jurisdiction for review of deportation orders does not preclude district court jurisdiction over these due process claims.

2. *Prudential Ripeness Concerns*

The Government also contends that prudential ripeness concerns mandate a denial of district court jurisdiction. Soon after the HRC decision, the Supreme Court addressed the relationship between the statutory exclusive review provision for INS deportation orders and the prudential ripeness concerns in the IRCA adjustment-of-status context. See *Reno v. Catholic Social Services*, 509 U.S. 43, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) ("CSS") (considering the INS practice of rejecting without consideration any agricultural worker legalization applications from aliens whom INS employees deemed a priori ineligible under the statute). The CSS Court

acknowledged that prudential ripeness concerns usually preclude jurisdiction "unless the effects of the administrative action challenged have been 'felt in a concrete way by the challenging parties.'" *Id.* at—, 113 S. Ct. at 2495 (quoting *Abbott Labs.*, 387 U.S. at 148-49, 87 S. Ct. at 1515-16). Although "[i]n some cases the promulgation of a regulation will itself affect parties concretely enough to satisfy this requirement," *id.* at—, 113 S. Ct. at 2495, the prudential doctrine and the statutory exclusive grant of jurisdiction "ordinarily" "dovetail" so that the claim ripens only at the point that the exclusive review provision applies, thus delaying review of constitutional challenges until the appellate review of a final deportation order. *Id.* at —, 113 S.Ct. at 2497.

The Government argues that *CSS* bars any pre-enforcement review because legalization is a benefit whose denial does not place the applicant in the dilemma of paying a cost to comply or paying a penalty for noncompliance. *See CSS*, 509 U.S. at —, 113 S. Ct. at 2495-96 (noting that the challenged regulations adopted to develop the criteria for temporary resident status merely limited access to a benefit not automatically bestowed on eligible aliens); *Abbott Labs.*, 387 U.S. 152-53, 87 S. Ct. at 1517-18 (discussing the compliance dilemma as one factor in determining ripeness). While we acknowledge that a positive outcome of the legalization process is a benefit for the alien, we disagree that this factor is determinative in the ripeness analysis of this due process claim, which challenges a collateral procedure limiting access to an entitlement. *See, e.g., Atlantic Richfield Co. v. United States Dep't of Energy*, 769 F.2d 771, 782-83 (D.C. Cir. 1984) (noting that ripeness concerns balance all aspects of hardship

to the parties against the extent to which strict adherence to ripeness requirements will ensure that issues are better fit for judicial review).

a. *Fitness: Concrete Effect and Adequacy of Agency Record*

The Supreme Court recognized that an agency action may result in immediate adverse consequences or pose a realistic threat of such harm. *CSS*, 509 U.S. at —, 113 S.Ct. at 2495. Challenges to the promulgation of a regulation, as in *CSS*, raise ripeness concerns that the courts will become involved in "abstract disagreements over administrative policies." *Abbott Labs.*, 387 U.S. at 148, 87 S. Ct. at 1515. Here, however, the INS' determination to adjudicate nondiscretionary statutory entitlements on the basis of undisclosed information represents a concrete controversy: by applying for legalization, each alien has already taken whatever "affirmative steps . . . he could take before the INS blocked his path." *CSS*, 509 U.S. at —, 113 S. Ct. at 2496.

Furthermore, agency actions that "pre-determine" the future action of the agency generate a sufficiently concrete effect to be cognizable by the courts. *See, e.g., Portland Audubon Society v. Babbitt*, 998 F.2d 705, 707 (9th Cir. 1993) (reviewing the Secretary of Interior's decision not to supplement an environmental impact statement with new information relating to the effects of logging on the northern spotted owl). In *Portland Audubon*, we held that the decision was ripe for review prior to the initiation of individual sales "because, to the extent these [agency actions] pre-determine the future, the Secretary's failure to comply with [the] NEPA [statute]

represents a concrete injury which would undermine any future challenges by plaintiffs." *Id.* at 708. The Notices of Intent to Deny similarly "pre-determined the future" and concretely affected Barakat and Sharif by subjecting them to a legalization determination based on secret information.

Moreover, these claims are ripe because the factfinding necessary for determination of the claim can only occur at the district court. *See, e.g., CSS*, 509 U.S. at — - —, 113 S. Ct. at 2499-2500 (recognizing the importance of an administrative record that would permit review on appeal from a deportation order); *Tooloe v. INS*, 722 F.2d 1434, 1437-38 (9th Cir. 1983) (same). In the present case, the district court appropriately applied the *Mathews* balancing test, in order to determine whether the administrative procedure satisfies due process. Under the test, the court must weigh:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L.Ed.2d 18 (1976). After ordering discovery, the district court granted the permanent injunction based on factual development in the following areas:

1) the importance to the plaintiffs of their immigration applications, 2) the risk that the plaintiffs will be erroneously deprived of temporary resident or other legalized status, 3) the likelihood that allowing access to the classified information would reduce the risk of an erroneous deprivation, and 4) the Government's interest in keeping certain information confidential because of national security concerns, together with the Government's interest in denying legalization to people who are members of groups such as the PFLP.

Because these issues do not come within the scope of the IRCA review process, the legalization and deportation proceedings cannot generate a record for review. *See HRC*, 498 U.S. at 493, 111 S. Ct. at 896 (noting that the administrative review process would not generate an adequate record for review of due process claims such as lack of translators). No facts relevant to the due process determination can be adduced at the agency hearing because that hearing proceeds under the premise that use of undisclosed information against the alien is legal. *See, e.g., Rafeedie*, 880 F.2d at 516-17 (stating that "any 'factual record' that [a hearing] would generate is unlikely to be more than a catalogue of the Government's untested allegations and [the alien's] not directly responsive denials").

b. *Hardship: First Amendment Chill and Right to Work*

As noted earlier, injury to First Amendment rights more readily justifies a finding of ripeness "due to the chilling effect on protected expression which delay

might produce.” *Planned Parenthood v. Kempiners*, 700 F.2d 1115, 1122 (7th Cir. 1983) (Cudahy, J. concurring) (noting that the statute in question forced a choice between exercising First Amendment rights to speak on the abortion issue and risking loss of eligibility for state benefits). Since the Government has targeted these aliens because of their association with the PFLP, the Notices of Intent to Deny had a palpable chilling effect. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-57, 108 S. Ct. 2138, 2142-44, 100 L.Ed.2d 771 (1988) (permitting a challenge to a licensing statute because it immediately “intimidates parties into censoring their own speech”); *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989) (permitting a preenforcement challenge to a statute because of its immediate “chilling effect on protected speech”). We agree with the D.C. Circuit that irreparable injury to First Amendment rights results from the use of secret information about presumptively protected affiliations in INS proceedings, since an alien denied legalization faces loss of his right to work and to support his family, *see HRC*, 498 U.S. at 490-91, 111 S. Ct. at 895, not because of his “illegitimate activities, but [because of] his legitimate activities as an outspoken critic of the Government’s foreign policy.” *Rafeedie*, 880 F.2d at 517. When weighed against the minimal benefit to judicial or administrative interests from further administrative proceedings, these injuries tip the scales against requiring exhaustion. *Id.* at 518.

We hold that the district court appropriately exercised jurisdiction over Barakat’s and Sharif’s claim that use of undisclosed classified information in the legalization process violates due process require-

ments because it is a collateral, procedural challenge to an INS practice that requires factfinding beyond the purview of the agency proceedings and does not challenge the INS’ individual determination of a substantive eligibility criteria. *See id.* Therefore, it falls under the *HRC* rule in accord with our *Naranjo* decision that district courts have jurisdiction when the “limited review scheme would be incapable of generating an administrative record adequate for effective judicial review.” *Naranjo-Aguilera*, 30 F.3d at 1113.

II. MERITS

A. THE PRELIMINARY INJUNCTION AGAINST SELECTIVE ENFORCEMENT

1. Standard of Review

We review a district court’s issuance of a preliminary injunction for abuse of discretion, which occurs if the court bases its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Miller v. California Pacific Medical Center*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc). A preliminary injunction is warranted where plaintiffs show “either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor.” *Johnson Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1174 (9th Cir. 1989).

2. *Selective Enforcement Justifies a Preliminary Injunction*

The district court determined that the Six were likely to succeed on their selective enforcement claims. We reiterate here the prima facie elements of the claim: (1) "others similarly situated have not been prosecuted" (disparate impact) and (2) "the prosecution is based on an impermissible motive" (discriminatory motive). *United States v. Aguilar*, 883 F.2d 662, 705 (9th Cir. 1989) (quoting *United States v. Lee*, 786 F.2d 951, 957 (9th Cir. 1986)), cert. denied, 498 U.S. 1046, 111 S. Ct. 751, 112 L.Ed.2d 771 (1991); see also *Wayte v. United States*, 470 U.S. 1063 598, 608, 105 S. Ct. 1524, 1531, 84 L.Ed.2d 547 (1985).

a. *Control Group and Evaluation of Evidence*

Crucial to the analysis is the establishment of the appropriate control group—a group that is similarly situated in all respects to those who claim selective enforcement, except for the attribute on which the selective enforcement claim rests. —*Aguilar*, 883 F.2d at 706-07; *United States v. Steele*, 461 F.2d 1148, 1150 (9th Cir. 1972) (finding an inference of discrimination where the defendant, who was a vocal advocate of non-compliance with census laws, was prosecuted while six others, who were not vocal though equally against compliance, were not prosecuted).

The district court selected as a control group those aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates. The factor thus isolated is association with governmentally disfavored political views, the ground on

which the six aliens claim they are being prosecuted. The court found that the government's proffered evidence of prosecution of similarly situated individuals was insufficient to defeat the disparate impact claim, because the cases involved individuals who had actually committed terrorist acts, rather than persons who merely associated with terrorist organizations. The court's conclusion that the aliens presented prima facie evidence of disparate impact is not clearly erroneous.

b. *First Amendment Guarantees in the Deportation Context*

The court also found that the statements of Webster and Odencrantz, which reveal that the aliens have been targeted because of their membership in terrorist organizations, established the prima facie element of impermissible motive, because the Government acknowledges that United States citizens cannot be arrested for the same behavior. Thus, the gravamen of this case is the legal question whether aliens may be deported because of their associational activities with particular disfavored groups, or whether aliens who reside within the jurisdiction of the United States are entitled to the full panoply of First Amendment rights of expression and association. "We review de novo issues of law underlying the district court's preliminary injunction." *Miller*, 19 F.3d at 455.

(1) *First Amendment Standards Protect Associational Activities*

The Government does not dispute that the First Amendment protects a citizen's right to associate with a political organization; even if that association includes ties with groups that advocate illegal conduct or engage in illegal acts, the power of the Government to penalize association is narrowly circumscribed. "[T]he right of association is a 'basic constitutional freedom' . . . [that] lies at the foundation of a free society." *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S. Ct. 612, 637, 46 L.Ed.2d 659 (1976) (citations omitted). Government cannot "deny[] rights and privileges solely because of a citizen's association with an unpopular organization." *Healy v. James*, 408 U.S. 169, 185-86, 92 S. Ct. 2338, 2348, 33 L.Ed.2d 266 (1972).

Under the standard enunciated by the Supreme Court in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969), advocacy may be punished only if it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447, 89 S. Ct. at 1829. The Government must establish a "knowing affiliation" and a "specific intent to further those illegal aims." *Healy*, 408 U.S. at 186, 92 S. Ct. at 2348. "Guilt by association alone" violates the First Amendment. *Robel*, 389 U.S. at 265-66, 88 S. Ct. at 424-25.

Here, the Government has not attempted to show that the aliens' association with the PFLP satisfies the currently applicable *Brandenburg* standard; instead, it argues that aliens are not entitled to the same First Amendment protections that citizens enjoy.

(2) *Aliens in the United States Enjoy Full First Amendment Rights*

The Supreme Court has consistently distinguished between aliens in the United States and those seeking to enter from outside the country, and has accorded to aliens living in the United States those protections of the Bill of Rights that are not, by the text of the Constitution, restricted to citizens. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5, 73 S. Ct. 472, 477 n.5, 97 L.Ed. 576 (1953). Accordingly, the Court has explicitly stated that "[f]reedom of speech and of press is accorded aliens residing in this country." *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 1449, 89 L.Ed. 2103 (1945); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S. Ct. 1056, 1064, 108 L.Ed.2d 222 (1990); *Kwong Hai Chew*, 344 U.S. at 596-97 n.5, 73 S.Ct. at 477-78 n.5. "None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority." *Bridges*, 326 U.S. at 161, 65 S.Ct. at 1455 (Murphy, J., concurring), quoted in *Kwong Hai Chew*, 344 U.S. at 596-97 n.5, 73 S. Ct. at 477-78 n.5.

Furthermore, the values underlying the First Amendment require the full applicability of First Amendment rights to the deportation setting. Thus, "read properly, *Harisiades* establishes that deportation grounds are to be judged by the same standard applied to other burdens on First Amendment rights." T. Alexander Aleinikoff, *Federal Regulation of*

Aliens and the Constitution, 83 Am. J. Int'l L. 862, 869 (1989).

Because we are a nation founded by immigrants, this underlying principle is especially relevant to our attitude toward current immigrants who are a part of our community. See, e.g., *Verdugo-Urquidez*, 494 U.S. at 265, 110 S. Ct. at 1060 (recognizing that aliens with substantial ties through family and work form part of our "national community"). Aliens, who often have different cultures and languages, have been subjected to intolerant-and harassing conduct in our past, particularly in times of crises. See, e.g., Alien Enemies Act of 1798, Act of June 25, 1798, ch. 58, 1 Stat. 570, 571 (authorizing the President to expel "all such aliens as he shall judge dangerous to the peace and safety of the United States"); John Higham, *Strangers in the Land: Patterns of American Nativism 1860-1925*, 229-31 (2d ed. 1963) (describing the Palmer Raids of 1919-20). It is thus especially appropriate that the First Amendment principle of tolerance for different voices restrain our decisions to expel a participant in that community from our midst. See *Bridges*, 326 U.S. at 149, 65 S. Ct. at 1450 ("[W]here the fate of a human being is at stake the presence of the evil purpose may not be left to conjecture.").

(3) *The Government's Arguments Are Inapplicable to Deportation*

(a) *Deportation Differs Significantly From Exclusion*

The Government's reliance on *Kleindienst v. Mandel*, 408 U.S. 753, 92 S. Ct. 2576, 33 L.Ed.2d 683

(1972), is misplaced. Nor do we find dispositive our earlier decision to apply the *Kleindienst* standard to review the Attorney General's decision to require listing of all organizations of which an applicant for naturalization is a member: we noted that "aliens at naturalization are not necessarily entitled to the full protection of the First Amendment arguably afforded in deportation hearings." *Price*, 962 F.2d at 843 n.7.

In *Kleindienst*, the Court merely upheld the Attorney General's discretion to deny a waiver to allow an entry visa to a Marxist professor from Belgium who had violated the restrictions on his visa during an earlier visit. 408 U.S. at 756-60, 92 S. Ct. at 2578-80.

The *Kleindienst* analysis expressly rests upon the Attorney General's discretionary power to determine who may enter the country from abroad, a power exercised by the political branches as a derivative of the sovereign power to "defend[] the country against foreign encroachment and dangers." *Kleindienst*, 408 U.S. at 765, 92 S. Ct. at 2582-83; see also *Landon v. Plasencia*, 459 U.S. 21, 28, 103 S. Ct. 321, 326, 74 L.Ed.2d 21 (1982). The essential distinction between exclusion and deportation rests on this territorial concept of a diverse national community within which citizens and resident aliens interact. See *Kwong Hai Chew*, 344 U.S. at 597 n.5, 73 S. Ct. at 477-78 n.5 (noting that constitutional protection of aliens stems from "the alien's presence within [the] territorial jurisdiction") (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 771, 70 S. Ct. 936, 940, 94 L.Ed. 1255 (1950)). The Framers explicitly recognized that aliens within this country participate in a reciprocal relationship of societal obligations and correlative protection. "As [aliens] owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and

advantage." James Madison, *Report on the Virginia Resolutions*, reprinted in Jonathan Elliot, 4 *Debates on the Federal Constitution* 546, 556 (1907). The Supreme Court has also acknowledged a "long-standing distinction between exclusion proceedings, involving the determination of admissibility, and deportation proceedings" that corresponds to the basic difference between protected status within the national community and unprotected status at the threshold of admission. *Plyler v. Doe*, 457 U.S. 202, 212-13 n.12, 102 S. Ct. 2382, 2392 n.12, 72 L.Ed.2d 786 (1982). Accordingly, we decline to extend *Kleindienst* to apply to the deportation context.

(b) *Relevance of the Civil Nature of Deportation*

We also reject the Government's contention that First Amendment constitutional protections are unnecessary because deportation is not a criminal proceeding. It is true that some constitutional protections, available to citizens and aliens alike in the criminal setting, do not apply in civil proceedings and thus do not apply to the non-criminal deportation proceedings. See, e.g., *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 3483, 82 L.Ed.2d 778 (1984) (holding that the exclusionary rule is inapplicable to deportation); *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742, 98 L.Ed. 911 (1954) (holding that the Ex Post Facto Clause is inapplicable to deportation). However, because the First Amendment's protections apply equally to non-criminal and criminal proceedings, see, e.g., *New York Times Co.*, 376 U.S. at 277, 84 S. Ct. at 724, constitutionally protected activities that the Government cannot punish

by means of a criminal statute are likewise beyond its reach in a deportation proceeding.

(c) *Relevance of Congress' Plenary Power*

We find no merit in the Government's argument that the broad authority of the political branches over immigration matters justifies limited First Amendment protection for aliens at deportation. This is a variant of its jurisdictional argument that immigration issues that involve foreign policy concerns are non-justiciable political questions.

First, although Congress and the President may regulate aliens' admission and residence in the country, that regulation must be "consistent with the Constitution." *Fong Yue Ting v. United States*, 149 U.S. 698, 712, 13 S. Ct. 1016, 1021, 37 L.Ed. 905 (1893). "Since resident aliens have constitutional rights, it follows that Congress may not ignore them in the exercise of its 'plenary' power of deportation." *Bridges*, 326 U.S. at 161, 65 S. Ct. at 1455 (Murphy, J., concurring); see also *Chadha*, 462 U.S. at 940-41, 103 S.Ct. at 2778-79. Thus, Congress' less restrained power to decide which aliens to exclude from entry, using processes and procedures that would be constitutionally suspect for citizens, is not dispositive regarding the constitutional constraints that operate at deportation. Cf. *Haitian Centers Council, Inc.*, 509 U.S. at — - —, 113 S. Ct. at 2560-61 (acknowledging the "important distinction" between deportation and exclusion in upholding the President's power to establish foreign policy reasons for repatriation of undocumented aliens intercepted on the high seas); *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977) (upholding immigration

preference categories for aliens at entry); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953) (upholding summary processes for exclusion of aliens at entry).

Second, our First Amendment jurisprudence rests on the fundamental principle that limitations on First Amendment rights are themselves damaging to the values underlying First Amendment protections. See, e.g., *Dombrowski*, 380 U.S. at 486-89, 85 S. Ct. at 1120-22. If aliens do not have First Amendment rights at deportation, then their First Amendment rights in other contexts are a nullity, because the omnipresent threat of deportation would permanently chill their expressive and associational activities. See Part I.A.1.b.(3).

(d) *Inapplicability of Exceptions to First Amendment Protections.*

Nor are the contextual restrictions on speech that the Supreme Court has upheld in certain institutional settings with special needs analogous to the proposed restrictions on aliens subject to deportation. See, e.g., *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 270-73, 108 S. Ct. 562, 569-71, 98 L.Ed.2d 592 (1988) (schools); *Turner v. Safley*, 482 U.S. 78, 89-93, 107 S. Ct. 2254, 2261-63, 96 L.Ed.2d 64 (1987) (prisons); *Goldman v. Weinberger*, 475 U.S. 503, 507, 106 S. Ct. 1310, 1313, 89 L.Ed.2d 478 (1986) (military); *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L.Ed.2d 659 (1976) (limitations on election campaign contributions); *Civil Serv. Comm. v. National Assoc. of Letter Carriers*, 413 U.S. 548, 93 S. Ct. 2880, 37 L.Ed.2d 796 (1973) (restrictions on federal employee

political activities). The speech in issue here is not confined to a particular setting.

(e) *Relevance of Other Distinctions Among Resident Aliens*

We reject the government's contention that we apply gradations of First Amendment protection parallel to the rational distinctions that are permissible pursuant to the Equal Protection Clause in determining which citizens and aliens may receive particular government benefits. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 83-84, 96 S. Ct. 1883, 1893-94, 48 L.Ed.2d 478 (1976) (upholding a five-year residency requirement for medicare benefits for aliens); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100-101, 96 S. Ct. 1895, 1903-04, 48 L.Ed.2d 495 (1976) (holding that an arbitrary regulation barring aliens from employment in the federal civil service violates due process, though suggesting that a classification based on a legitimate "overriding national interest" would not violate equal protection). Ordinary equal protection analysis requires only that the government bestow benefits in accord with classifications that rationally satisfy the stated government objective. See, e.g., *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 271-72, 99 S.Ct. 2282, 2291-93, 60 L.Ed.2d 870 (1979). In contrast, to deny citizens or aliens some measure of their admitted rights to First Amendment associational freedom would be to nullify the right in its entirety. The Government begs the question in asserting that differential treatment is merited because these six aliens with technical visa violations are at the bottom of the sliding scale of alien connections to this country; underlying this

contention is the assumption that the Government can use the pretext of technical violations to expel aliens on the basis of their group affiliations. That is the heart of the selective enforcement claim under consideration.

The aliens have provided evidence of disparate impact and of impermissibly motivated enforcement of the immigration laws. The aliens' First Amendment rights are subject to irreparable harm because of the prosecution, and they have a strong likelihood of success on their claim that the INS has selectively enforced the immigration laws in retaliation for their exercise of constitutionally protected rights. We conclude, therefore, that the district court did not abuse its discretion in granting a preliminary injunction against continued deportation proceedings for the Six.

B. THE DUE PROCESS CHALLENGE TO THE USE OF CLASSIFIED INFORMATION

1. *Standard of Review for a Permanent Injunction*

The district court's grant of a permanent injunction is reviewed "for an abuse of discretion or application of erroneous legal principles." *United States v. Yacoubian*, 24 F.3d 1, 3 (9th Cir. 1994) (quoting *Dexter v. Kirschner*, 984 F.2d 979, 982 (9th Cir. 1992)). Questions of law or mixed questions of law and fact implicating constitutional rights are reviewed de novo. *LaDuke*, 762 F.2d at 1322. The requirements for the issuance of a permanent injunction are "the likelihood of substantial and immediate irreparable injury and the inadequacy of remedies at law." *Id.* at 1330 (citations omitted).

2. *Appropriateness of the Permanent Injunction*

a. *Applicability of Due Process Protections to Aliens*

Aliens who reside in this country are entitled to full due process protections. *Diaz*, 426 U.S. at 77, 96 S. Ct. at 1890 (citations omitted); *see also Plasencia*, 459 U.S. at 32, 103 S. Ct. at 329 (finding that a returning longtime resident alien, unlike an alien seeking initial admission, has due process rights to an exclusion hearing); *Mezei*, 345 U.S. at 212, 73 S. Ct. at 629 (1953) (stating that "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law").

The Government does not dispute that the Due Process Clause protects Barakat and Sharif, but it contends that reliance on undisclosed information to determine legalization satisfies the demands of due process.

b. *Statutory and Regulatory Authority for Summary Process*

Barakat and Sharif applied for legalization in 1987. Section 201(a)(1) of IRCA establishes a two-step process by which illegal aliens who satisfy the eligibility requirements receive temporary resident status and then, after an additional time in the country, permanent resident status. 8 U.S.C. § 1255a. Among other criteria, the alien must demonstrate admissibility as an immigrant. 8 U.S.C. § 1255a(a)(4). The Attorney General must grant temporary and permanent status if the applicants satisfy the statutory criteria. 8 U.S.C. §§ 1255a(a), (b).

At the time that Barakat and Sharif applied for legalization, the INS regulations required that all issues of statutory eligibility for immigration benefits, including legalization, be determined solely on the basis of information in the record disclosed to the applicant. 8 C.F.R. § 103.2(b)(3)(ii) (1990); *see also* 8 C.F.R. §§ 103.2(b)(3)(iii), (iv) (1990); 8 C.F.R. § 242.17 (1994) (allowing use of undisclosed, classified information only for discretionary decisions). However, after a three-year delay, the INS finally issued Notices of Intent to Deny to Barakat and Sharif in March 1991, pursuant to amended regulations, effective upon publication as interim rules in January 1991, that extended the confidential use of classified information to statutory entitlement determinations. 8 C.F.R. §§ 103.2(b)(3)(ii), (iv) (1994) (as amended). The INS claimed that the information's "protection from unauthorized disclosure is required in the interests of national security, as provided in 8 C.F.R. § 103.2(b)(3)(iv)."

The Government cites Section 235(c) of the Immigration and Nationality Act, 8 U.S.C. § 1225(c) (as amended), as authority for use of the undisclosed classified information in the legalization determination. That statute establishes the powers of INS officers to inspect aliens "seeking admission or readmission," 8 U.S.C. § 1225(a), to temporarily detain aliens who are not entitled to enter "at the port of arrival," 8 U.S.C. § 1225(b), and to exclude aliens on the particular finding by the Attorney General that confidential information supports that exclusion, 8 U.S.C. § 1225(c) (allowing summary process for exclusion). We do not, however, accept the proposition that denying a resident alien legalization is the same thing as "exclusion".

Use of summary process in settings other than exclusion raises troubling due process concerns. *See, e.g., Kwong Hai Chew*, 344 U.S. 590, 73 S. Ct. 472 (barring the INS from using summary process to exclude a resident alien returning from abroad, because he was entitled to a hearing as of constitutional right). Thus, even reentering permanent resident aliens, who enjoy few rights because of the admitted power of Congress over entry into the country, are entitled to additional due process safeguards when subjected to the summary exclusion process. *Rafeedie*, 880 F.2d at 512, *on remand*, 795 F. Supp. 13, 20 (D.D.C. 1992) (applying the *Mathews* balancing test to determine that subjecting a returning resident alien, who was accused of being a PFLP officer, to summary exclusion proceedings utilizing secret information violated due process); *see also United States ex rel. Kasel de Pagliera v. Savoretti*, 139 F. Supp. 143 (S. D. Fla. 1956) (holding summary exclusion of returning permanent resident aliens unconstitutional).

The Government's attempt to distinguish *Rafeedie* from the case at bar on the ground that legalization is a benefit is unpersuasive. Reentry is also a benefit—one for which aliens have no constitutional entitlement. *Plasencia*, 459 U.S. at 32, 103 S. Ct. at 329 ("an alien seeking initial admission to the United States requests a privilege").

This limitation of the classified information provision to the exclusion context comports with the requirement that administrative and judicial review of deportation orders be based on "reasonable, substantial, and probative evidence on the record considered as a whole." 8 U.S.C. § 1105a(a)(4); *see Whetstone v. INS*, 561 F.2d 1303, 1306 (9th Cir. 1977) (finding that "[d]eportation on a charge not presented

in the order to show cause, or at the hearing, would offend due process" because record evidence must establish the basis for deportation). Because legalization decisions are reviewable under the deportation review provisions, the statutory scheme does not support use of summary process which relies on secret information as an alternative to regular hearing requirements.

The Government asserts, however, that under case law allowing use of undisclosed information for determinations that are statutorily unreviewable because they are delegated to the Attorney General's sole discretion, it has full statutory authority to use secret information to decide a legalization application. See *Jay v. Boyd*, 351 U.S. 345, 76 S. Ct. 919, 100 L.Ed. 1242 (1956). Interpreting the statutory provision for suspension of deportation, 8 U.S.C. § 1254, the *Jay* Court upheld the use of undisclosed information to inform the Attorney General's decision on the grounds that Congress explicitly delegated the decision to her "unfettered discretion" as "an act of grace." *Id.* at 354, 76 S. Ct. at 924-25. The statutory provision under consideration here, in contrast, requires that "the Attorney General shall adjust" the alien's status if the statutory eligibility requirements are satisfied. See 8 U.S.C. § 1255a(a). Thus, the extension of use of confidential information to mandatory statutory provisions such as the one at issue here is not warranted by the *Jay* rationale.⁷

⁷ Our conclusion that the Government wrongly relied on § 1255a provides an additional basis for the district court's subject matter jurisdiction for this due process claim. Because exclusive review applies only to decisions on the record, agency resort to summary process necessarily requires judicial review in the district court pursuant to its general federal question

The Government's reliance on *Campos v. INS*, 402 F.2d 758 (9th Cir. 1968), is similarly misplaced. Dictum in that case suggests that an alien applying for legalization under the discretionary statute, 8 U.S.C. § 1255, is "assimilated" to the position of (treated as) an entering alien both in terms of eligibility criteria and in terms of procedural rights. *Id.* at 760. Our later cases, however, have interpreted this "assimilation" rule narrowly, holding that it "refers to the application of eligibility criteria for admission and to differences in burden of proof." *Firestone v. Howerton*, 671 F.2d 317, 320 & 320 n.5 (9th Cir. 1982). Moreover, further assimilation of applicants to the position of an alien at entry would virtually eliminate the primary distinction between aliens at entry and aliens residing within the country. Therefore, although applicants for legalization must satisfy the substantive admissibility requirements, their constitutional rights, including their right to procedural due process, are not correspondingly diminished. Thus, we find that there is no statutory or regulatory basis supporting the Government's interest in use of classified information in legalization decisions pursuant to § 1255a.

and immigration law jurisdiction. See *Rafeedie*, 880 F.2d at 510-512, 512 (finding that "the generally applicable law of reviewability—that is to say, the [Administrative Procedure Act]—applies and provides for judicial review of such proceedings").

c. *The Mathews Balancing Test*

(1) *The Private Interest Affected*

Aliens who have resided for more than a decade in this country, even those whose status is now unlawful because of technical visa violations, have a strong liberty interest in remaining in their homes. See, e.g., *Plasencia*, 459 U.S. at 34, 103 S.Ct. at 330; *Firestone*, 671 F.2d at 321 n.10 (noting that the "equities" of long residence in the country are relevant to legalization). Similarly, the denial of legalization impacts the opportunity of an alien to work, which also raises constitutional concerns. *HRC*, 498 U.S. at 491, 111 S. Ct. at 895. The statute provides an entitlement not subject to denial according to the discretion of the Attorney General, as long as the eligibility requirements are satisfied. 8 U.S.C. § 1255a(a). Thus, the district court did not err in finding that the private interests affected are truly substantial.

(2) *The Risk of Erroneous Deprivation and Value of Safeguards*

There is no direct evidence in the record to show what percentage of decisions utilizing undisclosed classified information result in error; yet, as the district court below stated, "One would be hard pressed to design a procedure more likely to result in erroneous deprivations." See, e.g., *Goss v. Lopez*, 419 U.S. 565, 580, 95 S. Ct. 729, 739, 42 L.Ed.2d 725 (1975) (finding that "the risk of error is not at all trivial" in summary discipline in school settings). Without any opportunity for confrontation, there is no adversarial check on the quality of the information on which the

INS relies. See *Knauff*, 338 U.S. at 551, 70 S. Ct. at 316 (Jackson, J., dissenting) ("The plea that evidence of guilt must be secret is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of informer undetected and uncorrected.") (citation omitted).

Although not all rights of criminal defendants are applicable to the civil context, the procedural due process notice and hearing requirements have "ancient roots" in the rights to confrontation and cross-examination. *Greene v. McElroy*, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Id.* As judges, we are necessarily wary of one-sided process: "democracy implies respect for the elementary rights of men ... and must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 170, 71 S. Ct. 624, 647-48, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). "It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, in camera submissions." *Abourezk*, 785 F.2d at 1061. Thus, the very foundation of the adversary process assumes that use of undisclosed information will violate due process because of the risk of error. We conclude that the district court did not err in finding that there is an

exceptionally high risk of erroneous deprivation when undisclosed information is used to determine the merits of the admissibility inquiry.

(3) *The Governmental Interest*

The Government seeks to use undisclosed information to achieve its desired outcome of prohibiting these individuals whom it perceives to be threats to national security from remaining in the United States while protecting its confidential sources involved in the investigation of terrorist organizations. Yet the Government has offered no evidence to demonstrate that these particular aliens threaten the national security of this country. In fact, the Government claims that it need not. It relies on general pronouncements in two State Department publications about the PFLP's involvement in global terrorism and on the President's recent broad Executive Order prohibiting "any United States persons" from transacting business with the PFLP. See Exec. Order No. 12947 (January 23, 1995) (finding "that grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States"). We take judicial notice of these government documents on appeal for the limited purpose of assessing the strength of the Government's interest, see, e.g., *Castillo-Villagra v. INS*, 972 F.2d 1017, 1030 (9th Cir. 1992) (noticing a State Department report to assist in determining the plausibility of the petitioner's claim), yet we find these data insufficient to tip the Mathews scale towards the Government. These aliens have been free

since the beginning of this litigation almost eight years ago, without criminal charges being brought against them for their activities. According to the district court, the government's *in camera* submission targets the PFLP: although it indicates that the PFLP advocates prohibited doctrines and that the aliens are members, it does not indicate that either alien has personally advocated those doctrines or has participated in terrorist activities.

If Barakat and Sharif engage in any deportable activities, the government is not precluded from contesting their legalization or from instituting deportation on the basis of non-secret information. If the Government chooses not to reveal its information in order to protect its sources, the only risk it faces is that attendant to tolerance of Barakat's and Sharif's presence so long as they do not engage in deportable activities. Thus, although the Government undoubtedly has a legitimate interest in protecting its confidential investigations, it has not demonstrated a strong interest in this case in accomplishing its goal of protecting its information while prohibiting these aliens' legalization.

The Government's attempt to bolster its interest by relying on permitted uses of undisclosed information is misguided. Although the courts have allowed the Government to keep certain information confidential, the exceptions to full disclosure are narrowly circumscribed. *Abourezk*, 785 F.2d at 1061. For example, a formal claim of a "state secrets privilege" may prevent discovery and shield the use of materials against the Government in tort litigation for damages. *Id.*; see also *United States v. Reynolds*, 345 U.S. 1, 6-7, 73 S. Ct. 528, 531-32, 97 L.Ed. 727 (1953) (in a tort suit against the Government, permitting

nonproduction of an Air Force accident investigation report because of national security concerns); *Ellsberg v. Mitchell*, 709 F.2d 51 (D.C. Cir. 1983) (in a constitutional tort suit for damages against officials, allowing the Government to withhold production of wiretap information), *cert. denied*, 465 U.S. 1038, 104 S. Ct. 1316, 79 L.Ed.2d 712 (1984). However, the failure to disclose information prevents its use in the adversary proceeding: the effect of upholding the privilege is "that the evidence is unavailable, as though a witness had died." *Ellsberg*, 709 F.2d at 64. Even in those rare cases when the privilege operates as a complete shield to the government and results in the dismissal of a plaintiff's suit, the information is simply unavailable and may not be used by either side. *Id.*; *In re United States*, 872 F.2d 472 (D.C. Cir.), *cert. dismissed*, 493 U.S. 960, 110 S. Ct. 398, 107 L.Ed.2d 365 (1989); *Molerio v. F.B.I.*, 749 F.2d 815, 820-22 (D.C. Cir. 1984) (dismissing a Title VII complaint). Here, the Government does not seek to shield state information from disclosure in the adjudication of a tort claim against it; instead, it seeks to use secret information as a sword against the aliens.

Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process. We cannot in good conscience find that the President's broad generalization regarding a distant foreign policy concern and a related national security threat suffices to support a process that is inherently unfair because of the enormous risk of error and the

substantial personal interests involved. "[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Chadha*, 462 U.S. at 944, 103 S. Ct. at 2780. Therefore, we find that the district court did not err in deciding that use of undisclosed classified information under these circumstances violates due process.

3. *Applicability of Permanent Injunction Standards*

Because there is no adequate remedy at law to compensate for denial of legalization based on a constitutional violation, and because the use of secret information about their affiliation with the PFLP irreparably injures Barakat and Sharif by depriving them of a strong liberty interest without due process and, indirectly, by chilling their First Amendment rights of expression and association, we affirm the district court's grant of a permanent injunction against use of undisclosed information to adjudicate Barakat's and Sharif's legalization applications.

CONCLUSION

We find that the district court had subject matter jurisdiction, pursuant to its federal question and general immigration jurisdiction, over each of the claims presented here and that each claim is ripe for review. We affirm the district court's preliminary injunction against the selective enforcement of immigration laws against the Six; we reverse its determination that it lacks jurisdiction to review Hamide's and Shehadeh's selective enforcement claim, and we remand for that review; and we affirm

the court's issuance of a permanent injunction against the use of undisclosed classified information in legalization proceedings pursuant to § 1255a.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

Plaintiffs in each case are entitled to their costs against the Government.

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-02107 SVW (Kx)

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL., PLAINTIFFS

v.

JANET RENO, IN HER CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES,
ET AL., DEFENDANTS

[Filed Jan. 7, 1994]

AMENDED ORDER REGARDING HAMIDE AND SHEHADEH

Khader Hamide and Michel Shehadeh have made a motion for reconsideration of this Court's November 19, 1993 order regarding their cases. This Court believes that the holding in the prior order was correct but recognizes that some clarification and corrections are in order because, among other reasons, the Court misdescribed Hamide and Shehadeh's present claims.

THE COURT THEREFORE ORDERS THAT ITS NOVEMBER 19, 1993 ORDER BE VACATED AND

THAT THIS AMENDED ORDER BE ENTERED IN ITS PLACE.

THIS COURT ORDERS THAT SUMMARY JUDGMENT IS GRANTED FOR DEFENDANTS AND THAT DEFENDANT'S REQUEST FOR A PRELIMINARY INJUNCTION IS DENIED.

The Court recognizes that this order reverses holdings that this Court made in its August 1993 order. However, the Court now understands the Government's claims more clearly and has determined that its August 1993 order was incorrect regarding Hamide and Shehadeh's ability to further proceed with their selective prosecution claim.¹

Discussion

This case concerns the Government's efforts to deport eight Palestinians. All eight are allegedly members or associates of the Popular Front for the Liberation of Palestine ("PFLP"), a Marxist branch of the Liberation of Palestine Liberation Organization ("PLO"). In attempting to deport two of the Palestinians, Khader Hamide and Michel Shehadeh, the Government relies on the statutory provision allowing the deportation of aliens who have engaged in terrorist activity. In attempting to deport the other six aliens (Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, Aiad Khaled Barakat, Naim Nadim Sharif, Amjad Mustafa Obeid) ("Other Six"), the Government relies on non-ideological, non-terror-

¹ The Court recognizes that Hamide and Shehadeh have brought two alternative selective prosecution claims. Since the Court's present analysis is the same under either claim, they will be described jointly throughout this order as the selective prosecution claim.

ism related immigration law provisions such as expired visas. This order applies only to Hamide and Shehadeh. This Court will shortly issue another order covering the Other Six.

Hamide and Shehadeh have alleged that the Government's actions against them constitute selective prosecution. While this Court has substantial concerns regarding the Government's actions regarding Hamide and Shehadeh, the Court holds that the Ninth Circuit's earlier ruling in this case establishes that this Court lacks jurisdiction to enjoin the pending Immigration and Naturalization Service ("INS") proceedings against Hamide and Shehadeh. The Ninth Circuit ruling established that this Court did not have jurisdiction to hear Hamide and Shehadeh's facial or as applied challenge to the constitutionality of their deportation. This Court believes that, given the unusual facts of this dispute, Hamide and Shehadeh's selective prosecution claim is totally subsumed within the merits of their potential facial or as applied challenges. This Court is therefore equally without jurisdiction to hear the selective prosecution claim.

In its response to this Court's Order Listing Questions For Briefing and in the hearing before this Court on September 1, 1993, the Government clarified that it is seeking to deport Hamide and Shehadeh pursuant to the statutory provision for excluding aliens who have engaged in "terrorist activity". 8 U.S.C. § 1182(a)(3)(B)(i). The Government further clarified that it is relying on the portion of the definition of "terrorist activity", 8 U.S.C. § 1182(a)(3)(B)(iii)(III), which includes "providing of any type of material support . . . to any individual

the [alien] knows or has reason to believe has committed or plans to commit a terrorist activity."

While declining this Court's invitation to detail fully the factual allegations against Hamide and Shehadeh, the Government's counsel at the September 1, 1993 hearing stated that the Government's charges against Hamide and Shehadeh would include PFLP fundraising activities, PFLP recruiting, and PFLP publication distribution.

In their selective prosecution claim, Hamide and Shehadeh assert that the Government has chosen to deport them based on activity which is protected by the First Amendment to the United States Constitution. In fact, the purportedly constitutionally protected conduct which Hamide and Shehadeh assert is the true reason for the government's decision to selectively prosecute them is precisely the same activity which the government apparently intends to use as the actual basis for their deportation. As indicated in this Court's earlier rulings, the allegations described by the Government appear to consist entirely of activity protected by the First Amendment. See, e.g., *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 102 S. Ct. 434, 437-439, 454 U.S. 290 (1981) (monetary contributions to advocacy group protected by First Amendment); *International Soc. for Krishna Consciousness, Inc v. Lee*, 112 S. Ct. 2701, 2704-2705 (1992) (distribution of literature protected by First Amendment); *United Steelworkers of America v. Bagwell*, 383 F.2d 492, 496 (4th Cir. 1967) (distribution of literature and solicitation of union membership protected by First Amendment). This Court finds the Government's reliance on this apparently protected

activity troubling, but does not reach the merits of Hamide and Shehadeh's potential constitutional claims. *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510-512 (9th Cir. 1991).

Regardless of whether the Government's allegations consist solely of constitutionally protected activity, this Court does not have jurisdiction to hear any of Hamide and Shehadeh's selective prosecution challenge to the Government's conduct. There are only two possible manners in which the deportation hearing will proceed. The Government will either prove only that Hamide and Shehadeh engaged in conduct which is protected by the First Amendment or the Government will prove that Hamide and Shehadeh have provided "material support" to terrorists in a manner which is not protected by the First Amendment. In either case, this Court lacks jurisdiction. In either case, as discussed below, the selective prosecution claim requires the identical analysis required by the potential facial and as applied challenges to the statute.

On the one hand, if the charges against Hamide and Shehadeh consist solely of protected activity, the earlier opinion by the Ninth Circuit in this proceeding establishes that Hamide and Shehadeh must exhaust their administrative remedies before asserting that the Government's conduct is unconstitutional. *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510-512 (9th Cir. 1991). If the Government charges them solely with protected activity, the Court of Appeals will have a complete factual record and an official INS interpretation of the statute's meaning with which to

determine whether the statute is unconstitutional either on its face or as applied to Hamide and Shehadeh.² Furthermore, if the Government alleges only protected activity, Hamide and Shehadeh's selective prosecution claims will be irrelevant because the Ninth Circuit will hold that the statute itself is constitutionally invalid as applied to Hamide and/or Shehadeh.

Hamide and Shehadeh's selective prosecution claim is an anomaly because they are attempting to claim that they are being selected for deportation on the basis of protected activity while it appears, based on the government's description of the government's case, that their prosecution in fact rests on the same alleged activity. Thus, if the allegations only involve protected activity, their selective prosecution claim is unnecessary. The typical selective prosecution claim involves a defendant who faces prosecution based on allegations unrelated to protected activity who claims that the real reason she was selected for prosecution is that she engaged in protected activity. For example, the Other Six plaintiffs in this case claim that the government's reliance on visa time-period violations is a pretext for the government's attempt to punish their disfavored association with the PFLP. A selective prosecution claim is not proper when the allegations of the prosecution involve the same activity which the defendant claims is the constitutionally protected "true reason" for the government's decision to prosecute.

² In the deportation proceedings, the INS will preliminarily determine what the statute's "material support" provision covers. The final interpretation of the statute and the constitutionality of the statute will be resolved by the courts.

On the other hand, if the Government proves that Hamide and Shehadeh have engaged in more than constitutionally protected activity³, Hamide and Shehadeh do not have a cognizable "selective prosecution" claim. A selective prosecution claim requires the plaintiffs to demonstrate that the Government has chosen to act against them because of constitutionally protected activity. *United States v. Bourgeois*, 964 F.2d 935, 938 (9th Cir.), *cert. denied*, 113 S. Ct. 290 (1992) (defendant must show that prosecution based on impermissible motive). The Government constitutionally may choose to prosecute some providers of constitutionally unprotected material support without prosecuting others. The Executive Branch has nearly plenary authority to determine which side, if any, the United States supports in foreign disputes. *See United States v. Ramirez*, 765 F.2d 438 (5th Cir. 1985) (rejecting selective prosecution claim) (nothing "invidious" about using Neutrality Act against people supporting Haitian rebels but not against people supporting Cuban rebels), *cert. denied sub nom Perpignand v. United States*, 106 S. Ct. 812 (1986); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (no private right of action under Neutrality Act because such right would restrict prosecutorial discretion in an area where "normal desirability of such discretion is vastly augmented by the broad leeway traditionally accorded the Executive in matters of foreign affairs"); *Goldwater v. Carter*, 100

³ An example of unprotected provision of material support would be the provision of "explosives" or "training" to a terrorist. By providing this example, this Court does not in any way suggest that Hamide and Shemadeh have done such things or done anything more than exercise their First Amendment rights.

S. Ct. 533, 444 U.S. 996 (1979) (President has authority to unilaterally terminate treaty with Republic of China (Taiwan) as part of decision to recognize People's Republic of China (Beijing) as sole legal government of China); *United States v. Curtiss-Wright Export Corp.*, 57 S. Ct. 216, 299 U.S. 304 (1936) (President has substantial discretion to act in regard to disputes between foreign nations). The Executive Branch may therefore determine whether the provision of constitutionally unprotected material support will be tolerated in certain circumstances but prosecuted in others. When making such determinations, the Executive Branch is not deciding which side of a foreign dispute a United States resident alien may advocate, only which side may be provided constitutionally unprotected support. Such selectivity does not improperly infringe on the speech and associational activity protected by the First Amendment. See *United States v. Fares*, 978 F.2d 52, 59 (2d Cir. 1992) (where speech and non-speech elements are combined in same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedom"). If the government demonstrates that Hamide and Shehadeh have provided unprotected material support to a disfavored party to a foreign dispute, Hamide and Shehadeh cannot claim that the "true reason" they are being prosecuted is because of their protected support of that same foreign party. The plaintiffs' analogy to a government decision to selectively prosecute black people for assaults is unpersuasive because in that situation the alleged unlawful activity is unrelated to the constitutionally impermissible basis for the defendant's selection by the government.

THIS COURT THEREFORE FINDS THAT IT LACKS THE JURISDICTION TO HEAR HAMIDE AND SHEHADEH'S SELECTIVE PROSECUTION CHALLENGE.

To ensure that the record before the Ninth Circuit will be complete, this Court hopes that the deportation proceedings will produce detailed findings of fact establishing what specific acts the Government has shown Hamide and Shehadeh to have committed. Such findings will assist the Ninth Circuit in determining whether the Government has shown that Hamide and Shehadeh engaged in anything more than constitutionally protected activity.

IT IS SO ORDERED.

DATED: Jan 5, 1994

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87 2107 SVW (Kx)

AMERICAN ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL., PLAINTIFF

v.

JANET RENO, IN HER CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
DEFENDANT

[Filed Jan. 7, 1994]

ORDER REGARDING DISCOVERY ON SELECTIVE
PROSECUTION CLAIM AND GRANTING
PRELIMINARY INJUNCTION AGAINST FURTHER
DEPORTATION PROCEEDINGS

Plaintiffs Basher Amer, Aiad Barakat, Julie Mungai, Amjad Obeid, Ayman Obeid, and Naim Sharif are affiliated to some degree with the Popular Front for the Liberation of Palestine ("PFLP"). Plaintiffs allege that the government's decision to bring deportation proceedings against plaintiffs is a selective prosecution based on plaintiffs' support of the PFLP. See *Lennon v. United States*, 387 F. Supp. 561, 564-565 (1975) (selective prosecution challenge may be brought to enjoin deportation proceeding).

I. Elements of a Selective Prosecution Claim

This Court has described the elements of a selective prosecution claim in previous orders, but will repeat some of the Court's rulings in this order for purposes of clarity.

A selective prosecution claim has two elements. Plaintiff must prove:

(1) that others who are similarly situated have not been prosecuted, and

(2) that the prosecution is based on an impermissible motive. *United States v. Bourgeois*, 964 F.2d 935, 938 (9th Cir.), *cert. denied*, 113 S. Ct. 290 (1992).

Plaintiff must prove both these elements in order to overcome "the presumption that the prosecution was undertaken in good faith and in a nondiscriminatory fashion." *United States v. Christopher*, 700 F.2d 1253, 1259 (9th Cir.), *cert. denied*, 103 S. Ct. 2436, 461 U.S. 960 (1983).

A. Treatment of similarly situated others1. Meaning of first prong

The parties dispute the meaning of the first prong of the selective prosecution claim. The government contends that this prong requires proof that no similarly situated person has been prosecuted. In contrast, plaintiffs contend that this prong merely requires proof that a similarly situated person has not been prosecuted. This Court's understanding lies somewhere between the extremes advocated by the parties. The first prong has been held to require a showing that "similarly situated persons 'are

generally not prosecuted for the same conduct.” *United States v. Aguilar*, 883 F.2d 662, 706 (9th Cir. 1989) (citation omitted), *cert. denied sub nom Socorro Pardo v. United States*, 111 S. Ct. 751, 498 U.S. 1046 (1991). Based on this version of the first prong and the lack of logic in the extremes advocated by the parties, this Court will require plaintiffs to prove that the government does not generally seek to deport similarly situated people.

2. Control group

Analysis of the first prong requires comparing plaintiffs to a “control group” or others who are similarly situated. In *U.S. v. Aguilar*, 883 F.2d at 706, the Ninth Circuit explained how a control group is to be selected.

The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination. . . . The control group and defendant are the same in all relevant respects, except that defendant was, for instance, exercising his first amendment rights. *Id.*

In defining an appropriate control group, the Court must “isolate the factor allegedly subject to the impermissible discrimination so that the similarly situated group is analogous to the defendant without the one impermissible factor. *United States v. Gutierrez*, 990 F.2d 472, 476 (9th Cir. 1993).

In other words, the control group should consist of people (1) who have broken the same kind of law that plaintiffs are alleged to have broken and

(2) who have not engaged in the kind of activity which plaintiffs allege resulted in their selection for deportation.

The plaintiffs are alleged to have violated federal immigration law by overstaying their visas, by failing to maintain student status, and by working without authorization.

Plaintiffs allege that they have been selected for deportation because they are associated with the PFLP — a terrorist organization. Plaintiffs further allege that the government generally does not seek to deport individuals whom the government knows to be in violation of non-ideological immigration provisions such as those allegedly violated by plaintiffs. In particular, plaintiffs allege that the government generally does not seek to deport individuals who have committed passive, non-ideological immigration violations and who associate with terrorist organizations that the government supports or condones, such as the Contras, the Mujahadeen, RENAMO, and anti-Castro Cubans.

Given the allegations in this case, this Court has previously stated that the appropriate control group for these plaintiffs is: “individuals whom the government knows to be in violation of non-ideological provisions and who associate with terrorist organizations whose views the government endorses or tolerates.”¹

¹ The government contends that use of a control group which requires the Court to identify what foreign groups are supported or tolerated by the government and what foreign groups are opposed or not tolerated by the government will inappropriately involve this Court in a non-justiciable political question. The Court rejects this contention. The Court’s

Both plaintiffs and defendant have urged the court to modify this control group. Plaintiffs claim that the control group should be individuals whom the government knows to be in violation of non-ideological provisions and who associate with non-PFLP terrorist organizations. The problem with plaintiffs' proposed control group is 'nat it may include associates of other terrorist groups that the government may dislike and against which the government may seek to act by means of deportation. The Court wishes to avoid examining the government's treatment of other arguably disfavored terrorist groups such as the Irish Republican Army, Peru's Shining Path, or Hezbollah. The Court's control group better isolates the factor which plaintiffs allege has resulted in their disfavored treatment, i.e. association with a disfavored terrorist group.

Defendant wants a broader control group allowing evidence of any kind of prosecution against any alien associated with any terrorist group. The Court has previously rejected this proposal and does so again because such a control group would not properly isolate the alleged discrimination. For example, plaintiffs are not arguing that the government does

decision will not, in any way, constitute an endorsement or a condemnation of any foreign nation or alien group. Relying on public records, this Court can determine that the government has generally supported or at least tolerated the Mujahadeen, the Contras, anti-Castro Cubans and the other groups described by plaintiffs. Given abundant public statements by high government officials regarding every one of these groups, the government cannot reasonably contest that the government has supported or tolerated these groups while the government has generally opposed the PFLP and continues to condemn the PFLP in papers filed in this case.

not act against aliens who commit acts of violence or fraud.

Having considered the arguments of the parties, the Court finds that the appropriate control group is essentially the one previously chosen by the Court. *The relevant evidence for this prong will focus on evidence of whether the government has sought to deport members of "favored" terrorist groups such as the Contras, Mujahadeen, RENAMO, or anti-Castro Cubans for passive, non-ideological immigration violations such as those allegedly committed by plaintiffs.*

Thus, the government's frequent provision of information concerning the government's prosecutions and deportations of aliens committing non-immigration offenses, such as crimes of violence and drug offenses, is irrelevant because such aliens have not broken the same kind of law that plaintiffs are alleged to have broken. Such aliens are outside the control group because they have not committed *immigration violations* of the kind allegedly committed by plaintiffs. Similarly, the government's references to its actions against aliens who have actually committed acts of terrorism are irrelevant because the government has based its deportation claims against plaintiffs solely on allegations of non-violent conduct. Finally, the government's references to aliens who have committed immigration fraud are irrelevant because plaintiffs are not accused of the kind of calculated criminal behavior involved in a fraud claim. Plaintiffs are alleged to have passively violated the law by staying in this country too long and/or by not attending school frequently enough. If the government hopes to defeat plaintiffs' claims, the government must locate examples where members of

the control group were prosecuted for such passive, non-ideological immigration violations.

B. Impermissible motive

Plaintiffs allege that they were chosen for deportation because they are associated with the PFLP. As this Court has previously held, mere association with the PFLP is protected by the First Amendment. The PFLP is not solely a criminal organization. It does more than conduct terrorist operations. Thus, support of the PFLP or association with the PFLP would not be a permissible basis for the government to use in determining whom to prosecute. Plaintiffs' allegations of discriminatory purpose or intent state a claim sufficient to satisfy the requirements of the second prong of a selective prosecution claim. See *Gutierrez*, 990 F.2d at 476 (second prong requires proof of discriminatory purpose or intent).

II. The Competing Motions for Summary Judgment

This Court has previously rejected the government's motion for summary judgment. So that there will not be any confusion, the Court wishes to clarify its reasoning. Under Ninth Circuit law, a party alleging selective prosecution is entitled to conduct discovery if the party has introduced evidence establishing a "colorable basis" for both prongs of a selective prosecution claim. *Bourgeois*, 964 F.2d at 938-941; *United States v. Balk*, 706 F.2d 1056, 1060 (9th Cir. 1983). While a "colorable basis" is less demanding than a prima facie case, this Court recognizes that it is a "high threshold" requiring the presentation of specific facts, not merely allegations. *Bourgeois*, 964 F.2d at 939; *United States v. Fares*,

978 F.2d 52, 59 (2d Cir. 1992) ("[m]ere assertions and generalized proffers on information and belief are insufficient"). In this Court's earlier order of August 13, 1983, the Court reviewed the evidence offered by both parties. This evidence establishes a colorable basis for plaintiffs' allegations. Plaintiffs are entitled to further discovery.

The Court also has previously rejected plaintiffs' motion for summary judgment. While plaintiffs have presented substantial evidence on the second prong, i.e. discriminatory motive, plaintiffs have merely presented a colorable claim regarding the allegation that similarly situated others have not been targeted for deportation. The affidavits presented by plaintiffs do not establish a prima facie case. Furthermore, even if the affidavits were sufficient to establish a prima facie case, the government would be entitled to further discovery before this Court could determine that there is not a genuine issue of material fact regarding disparate enforcement. At this time, this Court does not believe that discovery regarding the personal knowledge of plaintiffs' declarants is necessary.

The appropriate source for further and presumably dispositive information regarding the crucial first prong is the records of the Immigration and Naturalization Service. The control group includes members of the Contras, Mujahadeen, RENAMO and anti-Castro Cuban groups. THIS COURT HEREBY ORDERS THE GOVERNMENT TO PRODUCE TO PLAINTIFFS BY FEBRUARY 11, 1994:

- (1) ANY RECORDS OF GOVERNMENT DEPORTATION ACTIONS DURING 1986 TO 1993 FOR NON-IDEOLOGICAL, PASSIVE VIOLA-

TIONS OF THE IMMIGRATION LAWS AGAINST ANY PERSON THAT THE GOVERNMENT KNEW WAS A MEMBER OF ANY OF THESE GROUPS.

(2) SUMMARY INFORMATION WITH APPROPRIATE SUPPORTING DECLARATIONS ESTABLISHING THE NUMBER OF PEOPLE IN EACH GROUP WHO MEET THE CONTROL GROUP DEFINITION OF INDIVIDUALS WHO HAVE COMMITTED PASSIVE, NON-IDEOLOGICAL VIOLATIONS OF THE IMMIGRATION LAWS AND WITH REGARD TO WHOM THE GOVERNMENT WAS AWARE (E.G., THROUGH APPLICATIONS FOR ASYLUM OR LEGALIZATION) OF THEIR SUPPORT OF OR AFFILIATION WITH TERRORIST GROUPS WITHIN THE CONTROL GROUP.

IN PRODUCING THESE RECORDS, THE GOVERNMENT MAY REDACT INFORMATION WHICH WOULD VIOLATE THE PRIVACY RIGHTS OF ANY PARTICULAR INDIVIDUAL AND WHICH WOULD NOT SERVE TO ASSIST THE COURT IN DETERMINING WHETHER THE CONTROL GROUP HAS BEEN TREATED DIFFERENTLY FROM THE PLAINTIFFS. FOR EXAMPLE, NAMES MAY BE REDACTED FROM THE INFORMATION IN CATEGORY ONE. THE GOVERNMENT, HOWEVER, MUST PROVIDE SUFFICIENT INFORMATION FOR PLAINTIFFS TO ESTABLISH EACH INDIVIDUAL'S NATION OF ORIGIN, GROUP AFFILIATION, ALLEGED IMMIGRATION VIOLATION AND DISPOSITION OF THEIR PROCEEDINGS.

After receiving this information, if plaintiffs still believe they can show disparate impact, PLAINTIFFS SHOULD FILE A MOTION FOR SUMMARY JUDGMENT ON THE DISPARATE IMPACT PRONG BY FEBRUARY 25, 1994. THE GOVERNMENT SHOULD FILE ITS OPPOSITION AND/OR ITS COMPETING MOTION FOR SUMMARY JUDGMENT BY MARCH 11, 1994. ANY REPLY PAPERS SHOULD BE FILED BY MARCH 18, 1994. THE PARTIES SHOULD NOTE THAT THIS JUDGE'S LOCAL RULES REQUIRE THAT PLEADINGS BE OF 25 PAGES OR LESS. THIS COURT WILL CONDUCT A HEARING ON SUCH MOTIONS ON MARCH 28, 1994.

ALTERNATIVELY, IF THE INFORMATION PROVIDED BY THE GOVERNMENT DOES NOT SUFFICIENTLY RESOLVE *THE DISCRIMINATORY IMPACT PRONG*, THEN PLAINTIFFS SHOULD FILE A MOTION WITH THIS COURT BY FEBRUARY 25, 1994. SUCH A MOTION SHOULD DESCRIBE IN DETAIL ANY INSUFFICIENCIES IN THE GOVERNMENT'S PRODUCTION AND THE REASONS WHY PARTICULAR ADDITIONAL DISCOVERY METHODS ARE NECESSARY. IF THIS ALTERNATIVE MOTION IS FILED, THE REMAINDER OF THE SCHEDULE FOR OPPOSITION AND REPLY WILL BE THE SAME AS ABOVE DESCRIBED FOR A MOTION FOR SUMMARY JUDGMENT.

Pending these motions, the Court will stay further discovery on the improper motive prong. *Cf. Bourgeois*, 964 F.2d at 941 (noting that evidence of unusualness of prosecution may also support finding of discriminatory motive).

III. Plaintiffs' Motion for a Preliminary Injunction

Plaintiffs have also moved for a preliminary injunction. This Court now feels that it is appropriate to rule on this motion. The Ninth Circuit standard for assessing motions for preliminary injunctions is found in *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173 (9th Cir. 1989). The party requesting the preliminary injunction must show (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) serious questions going to the merits and a balance of hardships tipping sharply in the party's favor. *Id.* at 1174. This test is viewed as establishing a continuum of fact and legal patterns between the two stated possibilities. *Id.*

Preliminary analysis of the merits

Given the evidence discussed in its August 13, 1993 order, this Court believes that plaintiffs have shown a likelihood of success on the merits on the issue of discriminatory motive. The weaker evidence on discriminatory impact, however, does not establish a likelihood of success on the merits. On the other hand, the proffered evidence does make a colorable claim and does raise serious questions going to the merits of the disparate impact prong.

Injury or hardship

The balance of hardships tilts sharply in favor of plaintiffs.² If deportation proceedings continue un-

² This Court recognizes that the Ninth Circuit has held that the hardships of the deportations process do not justify these plaintiffs in bringing an otherwise unripe challenge to the constitutionality of their deportation. *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F.2d 501, 510-512 (9th Cir. 1991). However, the hardship analysis of the

enjoined, plaintiffs face the strain of deportation hearings with all the possible consequences of adverse determinations, including the potential loss of privilege to work in this country. Plaintiffs also face the hardship and chilling effect of being subject to an allegedly bad-faith prosecution brought in retaliation for First Amendment activity. See *Fitzgerald v. Peek*, 636 F.2d 943, 944 (5th Cir.) (irreparable harm established if party shows prosecution brought in retaliation for exercise of constitutional rights), *cert. denied*, 101 S. Ct. 3051, 452 U.S. 916 (1981); *PHE, Inc. v. United States Dept. of Justice*, 743 F. Supp. 15, 25 (D.D.C. 1990) (injunction justified by showing that prosecution brought in retaliation for exercise of constitutional rights). On the other hand, if an injunction is issued pending final resolution of plaintiffs' claims, the government's only loss is a potentially unnecessary delay in the deportation of six people who have overstayed their visas. The government has not alleged or shown that plaintiffs continued presence in this country poses any other particular danger. The government's stated dislike of the PFLP does not constitute a hardship.

Upon consideration of the arguments and evidence offered in support of and in opposition to plaintiffs' motion and upon consideration of the entire record in this proceeding, plaintiffs have shown at least a serious question going to the merits on each prong of

Ninth Circuit addressed the issue of whether an otherwise unripe constitutional challenge was ripened based on the potential hardship for the plaintiffs. The present issue is ripe and this Court must now address a different hardship issue, i.e. what hardships will the parties suffer in the event that the injunction is issued and what hardships will the parties suffer in the event that the injunction is not issued.

their claim and have shown a likelihood of success on the merits on the discriminatory motive prong, and plaintiffs have shown that the balance of hardships tilts heavily in plaintiffs' favor. Plaintiffs have justified a preliminary injunction under *Johnson Controls, Inc.*

THIS COURT HEREBY ORDERS THAT DEFENDANT IS PRELIMINARILY ENJOINED FROM CONDUCTING FURTHER DEPORTATION PROCEEDINGS AGAINST PLAINTIFFS.

IT IS SO ORDERED.

DATED: January 5, 1994

/s/ STEPHEN V. WILSON
STEPHEN V. WILSON
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

No. CV 87 2107 SVW (Kx)

AMERICAN ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL., PLAINTIFF

v.

JANET RENO, IN HER CAPACITY
AS ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,
DEFENDANT

[Filed Jan. 7, 1994]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION REGARDING CONFIDENTIAL INFORMATION AND ORDERING FURTHER DISCOVERY

Plaintiffs Barakat and Sharif applied for legalization under the Immigration Reform and Control Act of 1986 ("IRCA"), 8 U.S.C. § 1255a. The mechanics of the application process were described in detail in this Court's order filed August 13, 1993.

Barakat and Sharif contend that the government has violated their procedural due process rights in using classified information—which was not made available to Barakat and Sharif—in the consideration of their applications. In response to their applica-

tions, the INS issued Notices of Intent to Deny which stated that the INS had reviewed classified information which indicated that Barakat and Sharif were members of the PFLP and therefore ineligible for temporary resident status—the first step in the legalization process. It is the Court's understanding that the next step in the application process will be for the INS to hold a hearing giving Barakat and Sharif an opportunity to rebut the government's allegations of PFLP membership. At that hearing the Government contends that it does not need to make the classified information supporting the allegations available to the plaintiffs.¹

Barakat and Sharif have moved for a preliminary injunction enjoining the INS from using confidential information in adjudicating their IRCA applications.² This Court has previously ruled that it has jurisdiction to address plaintiffs' claims and that plaintiffs' claims are justiciable because this Court holds that plaintiffs' claims more closely resemble the procedural due process claims presented in *McNary v. Haitian Refugee Ctr., Inc.*, 111 S. Ct. 888, 892, 894, 498 U.S. 479 (1991) than the statutory interpretation challenges in *Reno v. Catholic Social Services, Inc.*, 113 S. Ct. 2485, 2490, 2491, 2497 (1993).³ The Supreme

¹ Contrary to the government's contention, this factual background establishes that Barakat and Sharif have felt "in a concrete way" the administrative decision to use classified information. Barakat and Sharif's claims are ripe.

² No party has moved for summary judgment on the merits regarding the constitutionality of the contested secret procedures.

³ Like the *McNary* plaintiffs and unlike the *Catholic Social Services* plaintiffs, Barakat and Sharif are contesting the procedures being used to assess their applications not "reg-

Court's holding in *McNary* applies equally well to Barakat and Sharif's due process claims.

Because the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims to the procedures set forth in § 210(e) is not contemplated by the language of that provision. *McNary*, 111 S. Ct. at 896-897.

This Court continues to believe that plaintiffs raising procedural claims requiring fact-finding and record-developing may raise their claims in federal district court. The Court continues to believe that Barakat and Sharif are raising just such claims. See *Rafeedie v. INS*, 880 F.2d 506, 526, 524-525 (D.C. Cir. 1989) (procedural due process challenge to use of classified information in immigration decision requires development of factual records by district court in situation where relevant facts will not be developed in INS proceedings).

This Court must now consider the merits of the claims that the procedural due process rights of Barakat and Sharif have been and will be violated by the government's use of classified information—that plaintiffs have not seen and will not be allowed to see—in the adjudication of plaintiffs' applications for legalization.

The Court has previously stated that it intends to apply the *Matthews v. Eldridge*, 96 S. Ct. 893, 903, 424 U.S. 319 (1976), test to determine the procedural fairness of allowing the government to use

ulations specifying limits to eligibility." See *Reno v. Catholic Social Services*, 113 S. Ct. at 2497.

classified information in evaluating plaintiffs' applications while not allowing plaintiffs the opportunity to see the classified information. See *Landon v. Plasencia*, 103 S. Ct. 321, 330, 459 U.S. 21 (1982) (applying *Matthews v. Eldridge* to immigration procedures). *Matthews v. Eldridge* provides three factors for determining whether an administrative procedure satisfies due process:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Id.*

Given the facts of this dispute, this Court holds that the relevant considerations include:

- (1) the importance to the plaintiffs of their immigration applications;
- (2) the risk that the plaintiffs will be erroneously deprived of temporary resident or other legalized status because they cannot confront the evidence against them, together with the likelihood that allowing access to the classified information (or perhaps some proxy of the classified information) will reduce the risk of an erroneous determination of their applications; and
- (3) the government's interest in keeping certain information confidential because of national security concerns.

As the D.C. Circuit has explained, "[T]hese questions are to be asked not merely with reference to a single case, but having in mind the type of case it is, with regard to the run of such cases." *Rafeedie v. INS*, 880 F.2d at 524.

Plaintiffs have moved for a preliminary injunction enjoining the use of the classified information in the adjudication of their applications.

Preliminary injunction

Although it has previously declined to rule on the motion for a preliminary injunction, the Court now believes that it has sufficient information to rule on the motion. The Court has given the parties a number of opportunities to supplement the record for the motion. The government has informed the Court that it does not believe that any further development of the record is necessary. The government, however, has not responded to the Court's question regarding the statutory or regulatory authority for considering PFLP membership in denying temporary resident status. Similarly, the government has chosen not to offer even an *in camera* description of the specific factual allegations against Barakat or Sharif or of the nature of the confidential source providing the information upon which the government has relied.

The Ninth Circuit standard for assessing motions for preliminary injunctions is found in *Johnson Controls, Inc. v. Phoenix Control Systems, Inc.*, 886 F.2d 1173 (9th Cir. 1989). The party requesting the preliminary injunction must show (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) serious questions going to the merits and a balance of hardships tipping sharply in the party's favor. *Id.* at 1174. This test is viewed as

establishing a continuum of fact and legal patterns between the two stated possibilities. *Id.*

Preliminary analysis of the merits

The merits question requires consideration of the *Matthews v. Eldridge* factors in light of two sets of cases. In the first set of cases, courts, including the Supreme Court, have held that the INS may use classified information without disclosing it to applicants seeking discretionary relief. *Jay v. Boyd*, 76 S. Ct. 919, 927-928, 351 U.S. 345 (1956) (emphasizing "gratuitous" nature of relief sought, i.e. suspension of deportation); *Suciu v. INS*, 755 F.2d 127, 128 (8th Cir. 1985) (per curiam) (*Jay* precludes petitioner seeking discretionary relief from deportation from claiming that consideration of classified material violates due process rights) (noting in dicta that, if not for *Jay*, petitioner's argument would have substantial appeal as a matter of fairness and logic).

The Court holds that *Jay* is binding only on parties seeking discretionary relief.⁴ *Naji v. Nelson*, 113 F.R.D. 548, 551-552 (N.D. Ill. 1986) (*Jay* distinguished as applying only to discretionary matters) (discovery authorized regarding propriety of government's use of confidential information in adjudicating Naji's rights to statutory benefits); *Rafeedie v. INS*, 688 F.Supp. 729, 750 n.50 (D.D.C. 1988) (*Jay* limited to situations where party seeking discretionary relief), *aff'd in relevant part*, 880 F.2d 506, 519 (D.C. Cir. 1989) (affirming preliminary injunction); *see United*

⁴ The Court also notes that the basis for the Supreme Court's analysis in *Jay* has been seriously questioned. *See Jean v. Nelson*, 105 S. Ct. 2992, 2998, 3008 n.9, 472 U.S. 846 (1985) (Marshall, J., dissenting) (noting critical commentary on Cold War decisions forming basis for *Jay*).

States ex rel. Barbour v. District Director of INS, 491 F.2d 573, 578 (5th Cir.) (*Jay* authorizes use of confidential information in discretionary immigration proceedings, such as release on bail), *cert. denied*, 95 S. Ct. 135, 419 U.S. 873 (1974).

The second set of cases relate to the *Rafeedie* litigation in the District of Columbia. *Rafeedie v. INS* ("*Rafeedie I*"), 688 F. Supp. 729 (D.D.C. 1988); *Rafeedie v. INS* ("*Rafeedie II*"), 880 F.2d 506 (D.C. Cir. 1989); *Rafeedie v. INS* ("*Rafeedie III*"), 795 F. Supp. 13 (D.D.C. 1992). In this series of case, the District Court and the Court of Appeals for the District of Columbia have considered the INS's use of confidential information in exclusion proceedings against a permanent resident alien whom the government alleged was a member of the PFLP. In *Rafeedie I*, the district court granted a preliminary injunction against the INS's use of a summary exclusion proceeding including the use of undisclosed confidential information. In *Rafeedie II*, the D.C. Circuit affirmed the preliminary injunction and held that the *Matthews v. Eldridge* test applied to the Government's regulation allowing confidential information to be used. 880 F.2d at 519, 524. In *Rafeedie III*, the district court applied the *Matthews v. Eldridge* test and determined that to the extent that the government had already used confidential information against Rafeedie, Rafeedie's due process rights had been violated. 795 F.Supp. at 18-20. On the other hand, the District Court concluded that it could not invalidate the regulation authorizing the use of the summary proceeding because the government might voluntarily provide a more extensive hearing. 795 F. Supp. at 20-21.

In light of these two sets of cases and the facts of the present case, this Court now examines the *Matthews v. Eldridge* factors.

The first factor tilts heavily toward plaintiffs. While this Court recognizes the government's interest in controlling immigration, plaintiffs' asserted right to temporary resident status and legalization under IRCA is of tremendous importance both to these plaintiffs particularly, because the government claims that they are otherwise deportable, and to other applicants for legalization generally. See *Landon v. Plasencia*, 103 S. Ct. at 330 (applicant's interest is "weighty" because she "stands to lose the right 'to stay and live and work in this land of freedom'"). Furthermore, their asserted right is based on IRCA's statutory establishment of naturalization eligibility for certain aliens. It is not a discretionary benefit like that sought in *Jay v. Boyd*.

The second factor also favors plaintiffs. As noted in *Rafeedie III*, the confidential information might turn out to be erroneous and, if it is, plaintiffs will have a substantially better chance to explain the error if they know the specific allegations and the source of those allegations. 795 F. Supp. at 19; 688 F. Supp. at 749-750. Furthermore, not only do Barakat and Sharif not know the specific allegations, the government has not even informed them what statute or regulation supposedly gives relevancy to the allegations.

The third factor, however, favors defendant. The government's interest in national security certainly justifies preventing certain dangerous aliens from being naturalized under IRCA. National security also justifies protection of the type of confidential informants who assist the government in monitoring groups of dangerous aliens and who presumably

provided the basis for the allegations against the plaintiffs. However, the government has not provided any information regarding the confidential source supporting the allegations against Barakat and Sharif nor any information regarding any consequences that will result for that source if the allegations are made known to Barakat and Sharif. Additionally, the government has presented little or no evidence to this Court to indicate that these particular defendants—who have been in the United States for several years—are dangerous.

While this Court believes that the issue is close, the Court finds that an additional factor favoring the plaintiffs is history. Traditionally, over the past few decades, the INS has relied upon confidential information only in making discretionary decisions. The INS, until recently, has not relied on confidential information in adjudicating non-discretionary claims such as those of Barakat and Sharif. The INS has not presented any evidence showing why these new procedures are necessary. See *Rafeedie II*, 800 F. 2d at 523 (government points to no special effect in following traditional practices).

Balancing all the factors, this Court finds that Barakat and Sharif have shown that they will probably prevail on the merits of the *Matthews* test. In the language of preliminary injunction analysis, they have shown a likelihood of success on the merits.

The court notes *arguendo* that this balancing test might yield a different result if the government had offered evidence, even *in camera*, indicating that Barakat and Sharif posed a substantial national security threat and indicating that the confidential source making the allegations against plaintiffs was of substantial importance to the government's

intelligence gathering operations and indicating that the confidential source would be compromised or endangered if the specific allegations were made available to Barakat and Sharif.

Injury or hardship

Based on this Court's determination that plaintiffs have shown a likelihood of success on the merits, plaintiffs are entitled to a preliminary injunction if they can show either a possibility of irreparable injury or a balance of hardships strongly favoring plaintiffs.

The plaintiffs face serious consequences if the government is allowed to use the confidential information in the allegedly improper manner. Absent the confidential information, the government apparently does not contest plaintiffs' eligibility for temporary resident status. Denial of the right to temporary resident status will leave the plaintiffs in danger of deportation based on alleged visa overstays. See *Rafeedie II*, 880 F. 2d at 518, 519, 522 (hardship from potential loss in INS proceedings). Furthermore, plaintiffs may reasonably complain that their First Amendment activities as PFLP supporters are being chilled by their fear that these activities will be used against them either directly or in some distorted form when the government confidentially considers classified information in adjudicating their applications. *Rafeedie II*, 880 F.2d at 517. This Court therefore finds that plaintiffs have shown a possibility of irreparable injury and, alternatively, a balance of hardships sharply favoring plaintiffs.

Plaintiffs have therefore satisfied the requirements for a preliminary injunction.

THIS COURT HEREBY GRANTS PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION ENJOINING THE GOVERNMENT FROM USING CLASSIFIED INFORMATION IN CONSIDERING AND ADJUDICATING THE APPLICATIONS OF BARAKAT AND SHARIF UNLESS THE GOVERNMENT PROVIDES BARAKAT AND SHARIF WITH THAT INFORMATION.

As noted above, the preliminary injunction analysis might have had a different result if the government had offered more detailed information concerning the allegations against Barakat and Sharif and concerning the nature of the confidential source and concerning the consequences for the confidential source if the allegations were revealed to plaintiffs. The Court notes that as this case proceeds to final resolution, the government will almost certainly have to present such information. If the government offers such information, this Court would consider a motion to vacate the preliminary injunction.

Discovery issues

The Court notes that neither the government nor the plaintiffs have moved for summary judgment regarding the constitutionality of the provisions allowing the use of secret information. However, in order to facilitate such a motion, this Court will resolve the pending discovery disputes.

Plaintiffs will presumably be bringing (and defendant opposing) a motion for summary judgment seeking a declaration that the regulation authorizing the use of confidential information without disclosure is unconstitutional—both as applied and prospectively—as a violation of plaintiffs' due process rights.

Further factual development is necessary to determine whether there are any disputed issues of fact relevant to a final application of the *Matthews v. Eldridge* factors. On August 13, 1993, this Court issued an order asking, among other things, for the parties to describe any discovery which they thought would be necessary for an adequate assessment of the application of *Matthews v. Eldridge*.

The government stated that it did not believe that any further factual development was necessary.⁵

Plaintiffs, on the other hand, have requested some discovery. Plaintiffs want the government to provide information regarding the reason that INS regulations were modified to allow the use of confidential information in non-discretionary proceedings. Plaintiffs want the INS to provide information on the methods used at INS hearings before the regulations were modified to allow confidential information.

⁵ The government also stated that it did not understand how the INS could approve the plaintiffs' applications given the INS's knowledge of the classified information allegedly making Barakat and Sharif ineligible for approval and the INS did not see how it could disclose that information to Barakat and Sharif without violating federal law prohibiting the disclosure of such information. This is not the "distinct quandary" described by the INS. If this Court finds that the information cannot be used without its disclosure to Barakat and Sharif then the INS may adjudicate the applications without disclosing the information to Barakat and Sharif by not considering the information in adjudicating the applications. The Court reminds the INS that this is apparently what the INS historically did before the current provisions were enacted enabling the INS to consider classified information in non-discretionary adjudications. Since the INS is able to apply the law governing plaintiffs' applications without considering the disputed information, there is no quandary.

Plaintiffs want information on the nature of the security risks which the government alleges Barakat and Sharif create.

The Court does not feel that most of this discovery is necessary. The historical record of immigration procedures is available to both parties. Additionally, the Court anticipates that the INS's concerns in allowing confidential information will be generic concerns with terrorism and national security and that a detailed factual development of the reasons for the new policy will not be productive.

While this Court will not—at this time—require the government to detail the confidential allegations against Barakat and Sharif, this Court does require the government to provide this Court with an *in camera* declaration describing in detail the nature of the allegations against Barakat and Sharif and the nature of the national security interests that would be endangered by providing the confidential information to Barakat and Sharif. The government's declaration should describe the allegations in sufficient detail to allow this Court to understand the types and frequency of the alleged misconduct. The government's declaration should describe the source of the information in sufficient detail to allow this Court to determine the magnitude of the asserted national security interest involved in a potential exposure of that source.

Given its reading of *Matthews v. Eldridge*, the Court believes that some further discovery would be useful. The Court orders that the government should provide the following discovery to plaintiffs:

- 1) The government should notify plaintiffs whether there is any possibility that the government will allow plaintiffs access at their immigration hearings

to the confidential information forming the basis for the allegations against plaintiffs. *See Rafeedie III*, 795 F. Supp. at 20-21 (court noting possibility that INS will provide procedural protections not required by statute).

2) The government should notify plaintiffs of any consequences which will attach if their applications for temporary resident status are ultimately given a final denial, e.g. deportation status and right to work and to live free of custody while litigation proceeding.

3) The government should notify the plaintiffs of any other occasions in which the government has relied on confidential information in adjudicating IRCA applications. If there have been other such occasions, the government should provide the plaintiffs with summaries of each occasion describing the type of application/proceeding and the general nature of the confidential information.

4) Finally, this Court, in its August 1993 order, mentioned the need for the government to clarify the statutory or regulatory authority for considering PFLP membership or any other alleged misconduct in evaluating an application for temporary resident status under IRCA. While the filings in this case are voluminous, the Court does not believe that the government has answered the Court's question. The Court needs to know what statutes or regulations are being applied to Barakat and Sharif in order fully to assess the merits of their due process claim. Therefore, the Court hereby orders the government to notify this Court and plaintiffs Barakat and Sharif of the statutory or regulatory authority for considering PFLP membership or the allegations described in the confidential information in evaluating the IRCA applications of Barakat and Sharif.

THE COURT HEREBY ORDERS THE GOVERNMENT TO PROVIDE THIS DISCOVERY BY FEBRUARY 18, 1994.

A motion for summary judgment should focus on the need to develop a factual record for the procedural fairness of allowing confidential information in IRCA application proceedings in general and in the cases of Barakat and Sharif in general. The briefs should also inform the Court of other settings where the use of confidential information has been found constitutionally permissible or impermissible, particularly in situations involving non-discretionary adjudications. The briefs should also address the issue raised in *Rafeedie III* about the differing standards for addressing "as applied" and facial due process challenges to immigration procedures. *See* 795 F. Supp. at 18-21.

Once a motion for summary judgment is made, the Court will determine whether there are any disputed issues of material fact justifying an evidentiary hearing.

IT IS SO ORDERED.

DATED: January 5, 1994

/s/ STEPHEN V. WILSON

STEPHEN V. WILSON

UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

No. 89-55358

AMERICAN ARAB ANTI-DISCRIMINATION COMMITTEE,
ARABAMERICAN DEMOCRATIC FEDERATION,
ASSOCIATION OF ARABAMERICAN UNIVERSITY
GRADUATES, IRISH NATIONAL CAUCUS, ET AL.,
PLAINTIFFS-APPELLEES

v.

RICHARD THORNBURGH,^[*] ATTORNEY GENERAL;
ALAN C. NELSON, COMMISSIONER, INS,
HAROLD EZELL; ERNEST E. GUSTAFSON,
DISTRICT DIRECTOR, U.S. IMMIGRATION AND
NATURALIZATION SERVICE, DEFENDANTS-APPELLANTS

Argued and Submitted Aug. 10, 1990
Decided July 26, 1991

As Amended on Denial of Rehearing
and Rehearing En Banc July 20, 1992

Before: POOLE and THOMPSON, Circuit Judges,
and PRO, District Judge.**

* Richard Thornburgh has been substituted for Edwin Meese III, Fed. R. App. P. 43(c).

** Honorable Philip M. Pro, United States District Judge,
District of Nevada, sitting by designation

POOLE, Circuit Judge:

The government appeals from the district court's declaratory judgment that sections 241(a)(6)(D), (F)(iii), (G)(v), and (H) of the McCarran-Walter Act of 1952, codified in 8 U.S.C. §§ 1251(a)(6)(D), (F)(iii), (G)(v), and (H) (the Act), are unconstitutionally overbroad in violation of the first amendment.¹ We affirm

¹ In relevant part, section 1251 provides:

(a) Any alien in the United States . . . shall, upon order of the Attorney General, be deported who—

* * * * *

(6) is or at any time has been, after entry, a member of the following classes of aliens:

* * * * *

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

* * * * *

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches

. . . (iii) the unlawful damage, injury, or destruction of property; . . .

in part, reverse in part, vacate the judgment and remand for proceedings not inconsistent with this opinion.

FACTS

In January 1987, the Immigration and Naturalization Service ("INS") detained plaintiffs-appellees (individual appellees), Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, Aiad Khaled Barakat, Naim Nadim Sharif, and Amjad Mustafa Obeid, all non-immigrant aliens, for routine status, non-ideological violations under 8 U.S.C. §§ 1251(a)(2) and 1251(a)(9), and for violations of section 1251(a)(6) because of their membership in the Popular Front for the Liberation of Palestine (PFLP). PFLP is an organization which the government alleges advocates and teaches the "international and governmental

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or who knowingly have in their possession for the purpose of circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision.

doctrines of world communism," as recited in Section 1251(a)(6)(D). Specifically, the INS alleged that the individual appellees violated Sections 1251(a)(6)(D), (G)(v), and (H). In January 1987, the INS also began deportation proceedings against Khader Musa Hamide and Michel Ibrahim Shehadeh, permanent resident aliens, for their membership in the PFLP, alleging violations of sections 1251(a)(6)(D), (G)(v), and (H). On April 23, 1987, four days prior to the hearing set in this case by the district judge to consider plaintiffs' request for a preliminary injunction, the INS dropped its section 1251(a)(6) charges against the individual appellees, but retained the non-ideological charges.² The INS also changed the charges against Hamide and Shehadeh, alleging that they had violated Section 1251(a)(6)(F)(iii).³

PROCEDURAL HISTORY

On April 3, 1987, the individual appellees, joined by various organizations, including the American-Arab

² During the pendency of this appeal, the INS initiated deportation proceedings against the individual appellees under the non-ideological charges. Bashar Amer was found not deportable. The INS has appealed this decision to the Board of Immigration Appeals ("BIA"). Amjad Obeid and Ayman Obeid were found deportable; however, no final order of deportation has been entered in any of these proceedings. Amjad Obeid has applied for suspension of deportation pursuant to 8 U.S.C. § 1254(a), and Ayman Obeid has applied for adjustment of status pursuant to 8 U.S.C. § 1255(a). Both applications are pending review by the INS. The deportation proceedings of the remaining individual appellees remain closed pending review of their amnesty applications under 8 U.S.C. § 1255a.

³ The deportation proceedings brought against Hamide and Shehadeh for violation of Section 1251(a)(6)(F)(iii) were closed pending resolution of this appeal.

Anti-Discrimination Committee (American-Arab), and Hamide and Shehadeh, filed this complaint in the District Court for the Central District of California claiming that section 1251(a)(6)(D) violated the first and fifth amendments, that the government engaged in selective prosecution in violation of the first and fifth amendments, and that the INS procedures could not provide them with a fair and impartial hearing. They sought declaratory and injunctive relief. On May 12, 1987, the complaint was amended to include first and fifth amendment challenges to sections 1251(a)(6)(D), (F)(iii), (G)(v), and (H), and to include the claim that government misconduct deprived plaintiffs of due process. On May 21, 1987, the district judge dismissed Hamide's and Shehadeh's claims as to Sections 1251(a)(6)(F)(iii) for lack of jurisdiction and stayed the other claims pending a ruling by this court on the petition for writ of mandamus. Hamide and Shehadeh's petition for writ of mandamus was denied by order of this court on February 24, 1988. *Hamide v. United States District Court for the Central District of California*, No. 87-7249.

On June 15, 1988, plaintiffs filed a second amended complaint which retained their first and fifth amendment challenges but added a challenge to the Foreign Relations Authorization Act, (FRAA) Fiscal Years 1988 and 1989, Pub.L. No. 100-204, § 901, 101 Stat. 1331, 1399 (1987) (amended October 1, 1988). In a published memorandum opinion and order, *American-Arab Anti-Discrimination Committee v. Meese*, 714 F. Supp. 1060, 1084 (C.D. Cal. 1989), the district judge concluded that the challenged provisions of the McCarran-Walter Act were substantially overbroad in violation of the first amendment. The court accord-

ingly granted plaintiffs' motion for summary judgment and request for declaratory relief. However, believing that declaratory relief provided an adequate remedy at law, the district court denied injunctive relief. *Id.* at 1063. The district court also held that, given this relief, there was no need to address the challenge to the constitutionality of the FRAA. *Id.* On January 26, 1989, the district court directed entry of final judgment pursuant to Fed. R. Civ. P. 54(b). The district court retains jurisdiction over appellees' remaining claims. We have jurisdiction over final orders pursuant to 28 U.S.C. § 1291.

THE DISTRICT COURT'S RULING

In his memorandum opinion and order, the trial judge first considered whether the individual and organizational plaintiffs had standing. *Id.* at 1064-74. He determined that he was without jurisdiction to hear the constitutional challenges of Hamide and Shehadeh. *Id.* at 1064. They do not appeal this determination. The court held that the other individual appellees had standing because, although they were not presently charged under the challenged provisions of the McCarran-Walter Act, they had shown that they were in jeopardy of being so charged in the future. The court held that the government's continuing belief that the individual appellees belonged to a world-wide "communist" organization, the government's unwillingness to disavow any intent to bring the same charges against the individual appellees, the fact that the government's current manifestation of its willingness to use similar McCarran-Walter Act provisions against Hamide and Shehadeh on account of their membership in the PFLP, and the individual appellees' expressed intent to continue to engage in

the conduct for which they were originally charged, all supported the finding of their standing. *Id.* at 1064-71. The court dismissed all the organizational plaintiffs except American-Arab. *Id.* at 1071-72. The dismissed organizations do not appeal.

On the merits, the court determined that aliens are entitled to the same degree of first amendment protections as are citizens. *Id.* at 1082. Therefore, applying the test articulated in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969), the court held that the challenged statutory provisions were substantially overbroad under the first amendment because they penalized both protected and unprotected speech. 714 F. Supp. at 1082-84.

DISCUSSION

We agree with the district court that the individual appellees have standing. We nevertheless determine that the district court should have stayed its exercise of jurisdiction because, in our view, the first amendment issues tendered by appellees are not ripe for review. We therefore vacate the district court's order as to the substantive issues. We reverse the declaratory judgment, and we remand the case to the district court for further proceedings not inconsistent with this opinion.

I. Justiciability—Standing

The government argues that appellees' claims are not justiciable because they do not have standing. We review *de novo* the district court's determination that the individual appellees and American-Arab do have standing, *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987), while the underlying factual deter-

minations are reviewed under the clearly erroneous standard. *Id.*

A. Standing and the Individual Appellees

Under Article III of the Constitution, it is a jurisdictional prerequisite that plaintiffs present an actual "case or controversy". *Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *San Francisco County Democratic Central Comm. v. Eu*, 826 F.2d 814, 821 (9th Cir. 1987), *aff'd* 489 U.S. 214, 109 S. Ct. 1013, 103 L.Ed.2d 271 (1989). To satisfy this requirement plaintiffs must show, *inter alia*, that they have standing. Thus, plaintiffs must demonstrate:

"at an irreducible minimum . . . 'that [they] personally [have] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 [99 S. Ct. 1601, 1607, 60 L.Ed.2d 66] (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 [96 S. Ct. 1917, 1924, 1925, 48 L.Ed.2d 450] (1976)." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L.Ed.2d 700 (1982).

The essence of the government's standing argument with respect to the individual appellees is that they cannot show an immediate threat of harm. The government argues that, although once charged with the challenged provisions, the individual appellees are not now so charged. The government additionally

argues that there is no imminent likelihood that they will again be charged under the challenged provisions. It notes that the only pending proceedings against the individual appellees are for routine status violations and that "the [INS] has little or no incentive to reinstate the 'world communism' charges or to bring other charges under the non-routine provisions at issue here." Government's Opening Brief at 22. The threats to the individual appellees are therefore very attenuated because their injuries are unlikely to occur unless the government fails to sustain its routine violation charges and again institutes charges under the challenged provisions. The government analogizes this case to *Golden v. Zwickler*, 394 U.S. 103, 109, 89 S. Ct. 956, 961, 22 L.Ed.2d 113 (1969). Finally, citing *Laird v. Tatum*, 408 U.S. 1, 12-15, 92 S. Ct. 2318, 2325-27, 33 L.Ed.2d 154 (1972), and *Younger v. Harris*, 401 U.S. 37, 41, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971), the government avers that it is pursuing non-controversial administrative procedures and the mere fact that it has not forsworn use of the challenged provisions does not confer standing upon the individual appellees. Instead, it argues this court should look to the totality of the circumstances to determine whether the individual appellees face an immediate threat of injury. Therefore, it is the government's position, it is irrelevant that Hamide and Shehadeh have been charged with violations of the challenged provisions because, as "permanent resident" aliens, they could not be deported for routine status violations. The same is true of the exclusion proceedings involving Fouad Rafeedie, a permanent resident and an alleged member of the PFLP, which were initiated when he tried to reenter the country. See *Rafeedie v. INS*, 880 F.2d 506 (D.C. Cir. 1989).

The individual appellees contend that their standing is not affected by the fact that they are not currently charged with violations of the challenged provisions. They assert that they intend to engage in the proscribed conduct in the future and that the government has demonstrated its continued intention to enforce the challenged provisions. Since there is a continued threat of prosecution, individual appellees argue, standing exists. Therefore, they assert there is standing. Moreover, they argue, while they might ostensibly be deported for routine immigration violations, the real reason for such deportation would be based upon their participation in the constitutionally protected activity rather than the commission of allegedly routine violations. Finally, they challenge as disingenuous the government's argument that it has tactical reasons to recharge the individual appellees. They note that during the pendency of this appeal, the government added charges against Hamide and Shehadeh based on Section 1251(a)(6)(F)(ii), which had not been challenged in the district court. This change, they say, proves that the government has a ready stand-by: invocation of the challenged provisions whenever it may deem that appropriate.

Because the individual appellees are not currently charged with violations of the challenged statutory provisions, they must show that the threat of future injury is both "real and immediate." *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1665, 75 L.Ed.2d 675 (1983). This standing requirement is not satisfied merely by showing some "conjectural" or "hypothetical" injury, *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L.Ed.2d 674 (1974), or an injury which is "subjective," *Laird*, 408

U.S. at 13-14, 92 S. Ct. at 2325-26. Moreover, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy ... if unaccompanied by any continuing, present adverse effects." *Lyons*, 461 U.S. at 102, 103 S. Ct. at 1665 (quoting *O'Shea*, 414 U.S. at 495-96, 94 S. Ct. at 676).

We conclude, however, that the individual appellees meet the standing test. It is not necessary that they currently be subject to the challenged provisions in order to have standing; nor need they actually commit the forbidden provisions as a means of showing them to be in the dilemma which the court described in *Steffel v. Thompson*, 415 U.S. 452, 462, 94 S. Ct. 1209, 1217, 39 L.Ed.2d 505 (1974), as "the hapless plaintiff between the Scylla of intentionally flouting . . . [the] law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." See also *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2308, 60 L.Ed.2d 895 (1979). Nor is this a case in which the individual appellees' claimed threat of future injury is merely "hypothetical" or "conjectural." Already they have once been charged with the challenged provisions, which charges were dropped, not because they were considered inapplicable, but for tactical reasons. Compare *Younger v. Harris*, 401 U.S. at 42, 91 S. Ct. at 749 (denying standing in part because plaintiffs "do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible"). Presumably, then, the individual appellees need not run the risk of the consequences of another

violation of the challenged provisions in order to find protection.

However, even if they had not already been charged with violating the challenged provisions, the individual appellees would have standing. The challenged statute, unlike the government conduct challenged in *Laird*, is regulatory and proscriptive in nature, see 408 U.S. at 11, 92 S. Ct. at 2324, and the penalty for noncompliance is high. See *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93, 108 S.Ct. 636, 642-43, 98 L.Ed.2d 782 (1988).⁴ Moreover, the individual appellees fall within the class of persons whose conduct the statute proscribes, see *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 745, 35 L.Ed.2d 201 (1973), and against whom the government has already instituted proceedings under the challenged provisions. See *Steffel*, 415 U.S. at 459, 94 S. Ct. at 1215. Each case in which the government already has ventured into prosecution underscores the government's willingness to use the challenged provisions against aliens who are considered to be members of the PFLP. Furthermore, if it is true that Hamide and Shehadeh have been charged with the challenged provisions merely as a means of bringing about their deportation (since they have permanent resident status) this lends credence to their argument that the government may yet bring the challenged charges against the individual appellees. Their fears are

⁴ While the government correctly notes that deportation is not a criminal sanction, it has long been considered by the Supreme Court as "a drastic sanction, one which can destroy lives and disrupt families. . . ." See, e.g., *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 479, 83 S. Ct. 1819, 1824, 10 L.Ed.2d 1013 (1963).

therefore neither speculative nor imaginary as in *Younger*, 401 U.S. at 42, 91 S. Ct. at 749.

We turn now to the government's argument that the likelihood that the individual appellees are unlikely to be recharged for violations of the challenged provisions because to do so would be administratively inefficient. We do not readily see that the government's refusal to disavow future use of the challenged provisions alone provides standing to the individual appellees. Nevertheless, it is an attitudinal factor the net effect of which would seem to impart some substance to the fears of the individual appellees. See *American Booksellers Ass'n*, 484 U.S. at 393, 108 S.Ct. at 643 (this "alleged danger of the statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution"); *Dombrowski v. Pfister*, 380 U.S. 479, 494, 85 S. Ct. 1116, 1125, 14 L.Ed.2d 22 (1965) ("So long as the statute remains available to the State the threat of prosecutions of protected expression is a real and substantial one"); *NAACP v. City of Richmond*, 743 F.2d 1346, 1353 (9th Cir. 1984).

Finally, this case is not an analog of *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969), which is cited to us as an argument against standing. Zwickler was convicted of violating New York's election laws during his Congressional campaign. While his appeal to the Supreme Court was pending, Zwickler became a judge. The Supreme Court denied review because it appeared unlikely that Zwickler would again be a candidate for Congress. *Id.* at 109, 89 S. Ct. at 960. Unlike Zwickler's case, the positions of the individual appellees have not changed materially since the government withdrew the ideo-

logical charges against them. They are still subject to deportation either because the challenged statute may be invoked, or, alternatively, for routine status violations, and in either case, the two procedures are means of reaching the same result. In any event, on the whole, we cannot say that the cases of the individual appellees are such as to render it unlikely that they would engage in the acts which allegedly rendered them subject to deportation under the challenged provisions.

For the above reasons, the individual appellees have standing. We therefore affirm the district court's finding on this issue.

B. Standing and American-Arab

American-Arab sues in its own right and on behalf of its members. American-Arab has standing for such suit if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9, 108 S.Ct. 2225, 2231-32, 101 L.Ed.2d 1 (1988) (quoting *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L.Ed.2d 383 (1977)).

The government argues that American-Arab does not have standing to sue because it has not shown that its individual members would have standing. The government challenges the district court's reliance on the declaration of the Director of American-Arab's Legal Services Department (the "Director") which states that American-Arab "has members who would

support the PFLP, and hold PFLP views which they would advocate. . . ." Excerpt of Record at 73. The government contends that this is insufficient proof that American-Arab's members wish to engage in the activities proscribed by the challenged provisions. For the same reason, the government argues that American-Arab's statement in appellees' complaint, that its members receive and distribute literature which the government might consider a violation of one of the challenged provisions and that they financially and politically support, or would support, the PFLP are insufficient. Finally, the government argues that injury is not shown by alleging that the first amendment rights of American-Arab members have become "chilled." The government notes that the "[c]hilling effect" is cited as the *reason* why the governmental imposition is invalid rather than as the *harm* which entitles the plaintiff to challenge it." *United Presbyterian Church v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984) (emphasis in original); see also *Laird*, 408 U.S. 1, 13-14, 92 S.Ct. 2318, 2325-26 ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; 'the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.'" (citation omitted)).

In response, appellees argue that the Director's declaration is sufficient because American-Arab need not allege that its members *will* become members of or affiliate with the PFLP; the statute, they argue, proscribes oral and written advocacy as well. The appellees make no further argument specifically addressed to the standing of American-Arab, although

presumably they would adopt the arguments made in support of the standing of the individual appellees.

American-Arab, according to appellees' complaint, has more than 17,000 members and 6 local chapters in the United States. It publishes information of concern to Arab-Americans and provides legal services in defamation, discrimination, and immigration cases. Some of its members are of Palestinian origin and "engage in the kinds of activities which appear to be the basis for the pending deportation proceedings. . . ." Excerpt of Record at 42. Members also read and distribute literature such as *Al Hadaaf and Democratic Palestine* which the government indicates are periodicals which speak for the PFLP, "a self-described . . . Marxist-Leninist organization. . . ." Government's Opening Brief at 40.

We need not decide whether or when allegations of "chilling effect" are sufficient injury to support standing. Even if its members are "chilled," American-Arab has not alleged sufficient facts to support standing. American-Arab's allegations sufficiently give them a "special interest" in the outcome of the present case; however, this does not provide standing. *Sierra Club v. Morton*, 405 U.S. 727, 738-39, 92 S. Ct. 1361, 1367-68, 31 L.Ed.2d 636 (1972). American-Arab does not allege that its members have been charged with the challenged provisions, that they are members of the PFLP, or that they in fact wish to become members of the PFLP. The allegation that American-Arab and its members receive two publications which the government believes espouse the views of the PFLP does not prove that American-Arab members are subject to or will be subject to deportation under the challenged provisions. See *Younger*, 401

U.S. at 40-42, 91 S. Ct. at 748-50; *Hardwick v. Bowers*, 760 F.2d 1202, 1206 (11th Cir. 1985) (heterosexual couple claiming that the state's anti-sodomy law "chilled" aspects of their private life lacked standing because they failed to show membership in a group likely to be prosecuted), rev'd on merits, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); cf. *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 688-689, 93 S. Ct. 2405, 2416, 37 L.Ed.2d 254 (1973) ("A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action").

We reverse the district court's finding that American Arab has standing.⁵

II. Justiciability—Ripeness

Although the individual appellees do have "standing", it is our conclusion that their first amendment challenges are not ripe for review. Therefore, we vacate the district court's conclusion in this respect as a basis for its judgment.

Ripeness is "peculiarly a question of timing" *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 788 (9th Cir. 1986) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140, 95 S. Ct. 335, 357, 42 L.Ed.2d 320 (1974)). When considering "ripeness," we must determine whether the federal court is "the most appropriate

⁵ American Arab also argues that it has standing to sue on its own behalf. It has, however, failed to allege facts sufficient to support this claim.

institution to address the [plaintiffs'] claims at this particular time." *Id.* at 787. Ripeness, like other justiciability issues, is "not a legal concept with a fixed content or susceptible of scientific verification." *Poe v. Ullman*, 367 U.S. 497, 508, 81 S.Ct. 1752, 1759, 6 L.Ed.2d 989 (1961). Our resolution of this issue is, however, guided by two considerations: (1) whether the issues are fit for judicial decision and (2) whether the parties will suffer hardship if we decline to consider the issues. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149, 87 S. Ct. 1507, 1515, 18 L.Ed.2d 681 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105, 97 S.Ct. 980, 984, 51 L.Ed.2d 192 (1977).

This case has come to us upon a sketchy record and with many unknown facts. Given the procedural posture of the case, the facts understandably have not been well-developed. As a result, we do not know, for example, whether the appellees are actually members of the PFLP or what specific acts the government alleges the appellees to have committed in violation of the challenged provisions. In such situations, the Supreme Court has indicated that we ought not to exercise jurisdiction. *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309, 312, 88 S. Ct. 450, 452, 19 L.Ed.2d 546 (1967) (per curiam). Even in the case of a pre-enforcement challenge such as this, the exercise of jurisdiction without proper factual development is inappropriate. As explained by the Court, "the District Court should not be forced to decide . . . constitutional questions in a vacuum." *W.E.B. DuBois Clubs*. "The effect would be that important and difficult constitutional issues would be decided devoid of factual context and before it was clear that

[the suing parties] were covered by the Act." *Id.*; see also *Abbott Laboratories*, 387 U.S. at 148-49, 87 S. Ct. at 1515-16 (agency action is not fit for judicial review if the necessary facts have not been sufficiently developed).

Additionally, we lack the benefit of the INS's interpretation of the challenged provisions. For that matter, we are not beneficiaries of even the most tentative position by the INS in that respect. Indeed, no agency or court of which we are aware has ever had an opportunity to interpret these provisions or to establish a policy implementing them. Although the provisions have been codified in various forms since 1918, see Act of October 16, 1918, 40 Stat. 1012, the parties have not cited, nor have we found, any case or instance when they have been previously applied or interpreted. See *Socialist Workers Party v. Attorney General*, 642 F. Supp. 1357, 1428-30 (S.D.N.Y. 1986) (district court declined to interpret 8 U.S.C. § 1251(a)(6)(D) and denied declarative and injunctive relief where there was no evidence that the INS was considering deportation of aliens under that statute). Prudence thus counsels us to be chary of exercising jurisdiction in this uncharted arena.

The subject guiding principles are of uncertain application and unknown operation, see *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588-89, 92 S. Ct. 1716, 1719-20, 32 L.Ed.2d 317 (1972), and we lack the benefit of the INS's own interpretation to which we would wish to give substantial weight. *Miller v. Youakim*, 440 U.S. 125, 144, 99 S. Ct. 957, 968, 59 L.Ed.2d 194 (1979); cf. *West Coast Truck Lines, Inc. v. American Industries, Inc.*, 893 F.2d 229, 233 (9th Cir. 1990) (holding that agency's interpretation of the law

is final and ripe for review). To exercise jurisdiction, in advance of action by the INS, might well propel us into contravening the "basic rationale" of the ripeness doctrine: the court would become entangled in an abstract disagreement over administrative policy and would interfere before any INS decision was made affecting the parties in any concrete way. *Miller*, 440 U.S. at 148, 99 S. Ct. at 971; see also *FTC v. Standard Oil Co.*, 449 U.S. 232, 242, 101 S. Ct. 488, 494, 66 L.Ed.2d 416 (1980) (noting that judicial intervention after an agency has issued a complaint but before it has initiated proceedings "denies the agency an opportunity to correct its own mistakes and to apply its expertise. Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary" (citation omitted)).

Finally, we believe that any hardship suffered by the individual appellees resulting from our decision to delay resolution of their claims does not amount to a justification for us to exercise jurisdiction. The individual appellees are not now charged under the challenged provisions. Moreover, if charged and found deportable for violation of the challenged provisions, the individual appellees will have the opportunity to present their constitutional challenges to a court. See *Chadha v. INS*, 634 F.2d 408 (9th Cir. 1980), aff'd, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983). We therefore do not have a case in which "delayed resolution of these issues would foreclose any relief from the present injury suffered by appellees." *Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 82, 98 S. Ct. 2620, 2635, 57 L.Ed.2d 595 (1978). Contrariwise, adequate procedures exist for the vin-

dication of the individual appellees' claims. To exercise jurisdiction at this stage would thus be premature. See *W.E.B. DuBois Clubs*, 389 U.S. at 312, 88 S. Ct. at 452; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20, 104 S. Ct. 2862, 2881-82, 81 L.Ed.2d 815 (1984).

In the absence of factual context upon which to rely in formulating a decision, the benefit of the INS's interpretation of the statute, its position with respect to the challenged provisions, or sufficient hardship to the individual appellees resulting from a refusal to exercise jurisdiction, we conclude that the issues here are simply not ripe for review. Thus, we find the "[p]roblems of prematurity and abstractness . . . present 'insuperable obstacles' to the exercise of . . . jurisdiction, even though that jurisdiction is technically present." *Gilligan*, 406 U.S. at 588, 92 S. Ct. at 1719 (quoting *Rescue Army v. Municipal Court*, 331 U.S. 549, 574, 67 S. Ct. 1409, 1422, 91 L. Ed. 1666 (1947)).

Nor is it proper to exercise jurisdiction over appellees' facial attacks on the challenged provisions. It is true that an established factual record and existing agency interpretation are not necessarily required before we will entertain a facial challenge. See *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 n.11, 108 S. Ct. 2138, 2151 n.11, 100 L.Ed.2d 771 (1988). But, given the circumstances of this case, the challenged provisions present only "harmless, empty shadows." *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L.Ed.2d 989 (1961). The provisions at issue here have been supplanted by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1251).

Moreover, none of the individual appellees is currently charged, and the United States has expressly disavowed any intention of filing future charges against the appellees under the challenged provisions. The challenged provisions, which have gone unenforced for so many years, and which present no substantial threat of being enforced in the future, do not give rise to a controversy ripe for decision.

CONCLUSION

The district court's determination that the individual appellees have standing is **AFFIRMED**. The district court's determination that American-Arab has standing is **REVERSED**. Regardless of standing, we hold that the trial court improvidently exercised jurisdiction because the issues presented simply were not ripe for review. Accordingly, we **VACATE** the judgment and **REMAND** to the district court for proceedings consistent with this opinion. Parties will bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, VACATED, and REMANDED.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-02107-SVW

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL., PLAINTIFFS*v.*EDWIN MEESE, III, *ET AL.*, DEFENDANTS

Jan. 26, 1989

[As Amended Aug. 31, 1989]

Before: WILSON, District Judge.

Plaintiffs Khader Musa Hamide and Michel Ibrahim Shehadeh ("Hamide and Shehadeh"); Bashar Amer, Ayman Mustafa Obeid, Julie Nuangugi Mungai, Aiad Khaled Barakat, Naim Nadim Sharif, Amjad Mustafa Obeid ("Other Six"); American-Arab Anti-Discrimination Committee, Arab-American Democratic Federation, Association of Arab American University Graduates, Irish National Caucus, Palestine Human Rights Campaign, American Friends Service Committee, League of United Latin American Citizens, Michel Bogopolsky, Darrel Meyers, and Southern California Interfaith Task Force on Central America ("Organizational Plaintiffs") move the Court for summary judgment and for declaratory and injunctive relief. They challenge the constitutionality of Sec-

tions 241(a)(6)(D), (F)(iii), (G)(v), and (H) of the McCarran-Walter Act of 1952, ("McCarran-Walter provisions"), codified in 8 U.S.C. §§ 1251(a)(6)(D), (F)(iii), (G)(v), and (H),¹ and of Sections 901(a) and

¹ 8 U.S.C. § 1251(a)(6) provides in pertinent part:

(a) General classes

Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

(6) is or at any time has been after entry, a member of any of the following classes of aliens:

(D) Aliens not within any of the other provisions of this paragraph who advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization that advocates the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of, or funds furnished by, such organization;

(F) Aliens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . (iii) the unlawful damage, injury, or destruction of property; . . .

(G) Aliens who write or publish, or cause to be written or published, or who knowingly circulate, distribute, print, or display, or knowingly cause to be circulated, distributed, printed, published, or displayed, or who knowingly have in their possession for the purpose of

901(b) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 ("FRAA"), Pub.L. No. 100-204, § 901, 101 Stat. 1331, 1399 (1987) (amended October 1, 1988).²

circulation, publication, distribution, or display, any written or printed matter, advocating or teaching opposition to all organized government, or advocating or teaching . . . (v) the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship;

(H) Aliens who are members of or affiliated with any organization that writes, circulates, distributes, prints, publishes, or displays, or causes to be written, circulated, distributed, printed, published, or displayed, or that has in its possession for the purpose of circulation, distribution, publication, issue, or display any written or printed matter of the character described in paragraph (G) of this subdivision.

² The amended version of Section 901 provides in pertinent part:

Sec. 901. PROHIBITION ON EXCLUSION OR DEPORTATION OF ALIENS ON CERTAIN GROUNDS

(a) **IN GENERAL.**—Notwithstanding any other provision of law, no nonimmigrant alien may be denied a visa or excluded from admission into the United States, or subject to deportation because of any past, current or expected beliefs, statements or associations which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States.

(b) **CONSTRUCTION REGARDING EXCLUDABLE ALIENS.**—Nothing in this shall be construed as affecting the existing authority of the executive branch to deport, to deny issuance of a visa to, to deny adjustment of status of, or to deny admission to the United States of, any alien—

(1) for reasons of foreign policy or national security, except that such deportation or denial may not be based on past, current, or expected beliefs, statements, or associa-

Defendants Edwin Meese, III, Alan Nelson, Harold Ezell, Ernest Gustafson, and the Immigration and Naturalization Service ("Government") move the Court to dismiss the action for lack of jurisdiction and for failure to state a claim or for judgment on the pleadings.

tions which, if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States, unless such alien is seeking issuance of a visa, adjustment of status, or admission to the United States as an immigrant;

(2) who a consular official or the Attorney General knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity or is likely to engage after entry in a terrorist activity; or

(3) who seeks to enter in an official capacity as a representative of a purported labor organization in a country where such organizations are in fact instruments of a totalitarian state.

In addition, nothing in subsection (a) shall be construed as applying to an alien who is described in section 212(a)(33) of the Immigration and Nationality Act (relating to those who assisted in the Nazi persecutions), to an alien described in the last sentence of section 101(a)(42) of such Act (relating to those assisting in other persecutions) who is seeking the benefits of section 207, 208, 243(h)(1), or 245A of such Act (relating to admission as a refugee, asylum, withholding of deportation, and legalization), or to an alien who is described in section 21(c) of the State Department Basic Authorities Act of 1956 [members of the Palestine Liberation Organization ("PLO")]. In paragraph (2), the term "terrorist activity" means the organizing, abetting, or participating in a wanton or indiscriminate act of violence with extreme indifference to the risk of causing death or serious bodily harm to individuals not taking part in armed hostilities.

We conclude that the Other Six and the American-Arab Anti-Discrimination Committee ("ADC") have standing to challenge the McCarran-Walter provisions. On the merits, we hold that aliens within the United States are protected by the First Amendment of the United States Constitution and that this protection is not limited in the deportation arena by the Government's plenary immigration power. Applying established First Amendment principles, we find that the McCarran-Walter provisions are substantially overbroad in violation of the First Amendment. We therefore grant Plaintiffs' motion for summary judgment and request for declaratory relief. As these rulings provide Plaintiffs with an adequate remedy at law, we deny their request for injunctive relief. *See Beacon Theatres v. Westover*, 359 U.S. 500, 509, 79 S. Ct. 948, 956, 3 L.Ed.2d 988 (1959). We further deny the Government's motion for judgment on the pleadings and its motion to dismiss for lack of jurisdiction or failure to state a claim. Our holding that all aliens are entitled to First Amendment protections in the deportation setting obviates the need to address the constitutionality of Sections 901(a) and 901(b) of the FRAA.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Immigration and Naturalization Service ("INS") first commenced deportation proceedings against Hamide, Shehadeh, and the Other Six in January of 1987 alleging that these aliens were deportable under the McCarran-Walter provisions. Specifically, the Government charged them with being members of or affiliated with the Popular Front for the Liberation of Palestine ("PFLP"), an organiza-

tion that advocated the economic, international and governmental doctrines of world communism through written and/or printed publications issued on or under the authority of such organization. On April 23, 1987, the INS abandoned the proceedings against all the aliens on these charges. New McCarran-Walter Act charges were brought against Hamide and Shehadeh under Section 241(a)(6)(F)(iii) of the McCarran-Walter Act ("Section (F)(iii)") while the Other Six were charged with non-ideological immigration violations under 8 U.S.C. ss 1251(a)(2) and 1251(a)(9).

This Court first heard challenges to the deportation proceedings and the constitutionality of the McCarran-Walter provisions in April of 1987. In our May 21, 1987 and June 3, 1987 Orders, we held that the matter was not ripe for decision because Hamide and Shehadeh had not exhausted their administrative remedies with the INS and because a direct review of the statute was available through mandamus to the Ninth Circuit Court of Appeals. The Court of Appeals in its February 24, 1988 Order agreed that the case was not justiciable and refused to review the statute because Hamide and Shehadeh had not exhausted their administrative remedies.

In 1987, after we first held hearings in this matter, Congress passed the FRAA which provided in Section 901(a), *inter alia*, that aliens could not be deported on the basis of expression or beliefs that would be protected by the First Amendment if engaged in by United States citizens. Section 901(b) of the FRAA carved out several exceptions to the general rule stated in Section 901(a). In particular, Section 901(b) excepts members of the PLO from the protection of

Section 901(a).³ This statute was thereafter modified in October 1988 so that it applied only to nonimmigrant aliens.⁴

After the Ninth Circuit's decision, Hamide, Shehadeh, the Other Six, and the Organizational Plaintiffs again asked this Court to review the constitutionality of the McCarran-Walter provisions and Section 901(a) and Section 901(b) of the FRAA. We first address their standing to make these challenges.

DISCUSSION

I. STANDING

A. *Standing of Hamide and Shehadeh*

In its May 21, 1987 and June 3, 1987 Orders, this Court dismissed Hamide and Shehadeh's claim on the basis that they could seek interlocutory review of their claim by the Ninth Circuit under the All Writs Act, 28 U.S.C. § 1651. In its February 24, 1988 Order, the Ninth Circuit denied Hamide and Shehadeh's petition for a writ of mandamus. *Hamide v. United States District Court*, No. 87-7249 (9th Cir. Feb. 24,

³ We will refer to this Section 901(b) exception for PLO members as the "PLO Exception."

⁴ Under 8 U.S.C. § 1101(a)(15), all aliens are presumed to be immigrant aliens unless they fall within one of the specifically enumerated classes of nonimmigrant aliens. For example, among the Other Six, Naim Nadim Sharif and Aiad Khaled Barakat were admitted under 8 U.S.C. § 1101(a)(15)(B) as temporary visitors; Julie Nuangugi Mungai was admitted under 8 U.S.C. § 1101(a)(15)(H)(i) as a temporary worker; and Amjad Mustafa Obeid, Ayman Mustafa Obeid, and Bashar Amer were admitted under 8 U.S.C. § 1101(a)(15)(F) as students.

1988). The Court of Appeals expressly declined to consider the constitutional issue posed by the petition, stating that the petitioners had not exhausted their administrative remedies. In addition, the Court of Appeals ruled that this Court lacked jurisdiction to hear Hamide and Shehadeh's constitutional challenge to Section (F)(iii).

Since Hamide and Shehadeh have still not exhausted their administrative remedies and the Ninth Circuit retains exclusive jurisdiction under 8 U.S.C. § 1105a to review their final deportation order, this Court lacks jurisdiction to hear their claim. Acting pursuant to the Ninth Circuit's Order, this Court denies standing to Hamide and Shehadeh to challenge the McCarran-Walter provisions or Section 901 of the FRAA.

B. *Standing of the Other Six*

Under Article III of the United States Constitution and the express terms of the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, federal courts may hear legal claims only if they arise from an "actual controversy."⁵ A case or controversy requires a plaintiff to have a personal stake in the outcome sufficient to assure an adversarial presentation

⁵ 28 U.S.C. s 2201(a) provides:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

of the case. See *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L. Ed. 2d 663 (1962); *Hardwick v. Bowers*, 760 F.2d 1202, 1204 (11th Cir.1985), rev'd on other grounds, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); see also *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506, 92 S. Ct. 1749, 1755, 32 L. Ed. 2d 257 (1972) (an "actual controversy" under the Declaratory Judgment Act exists when "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment") (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 512, 85 L.Ed.826 (1941)).

For a plaintiff to have standing under Article III and the Declaratory Judgment Act, he or she must, "at an irreducible minimum," claim that he or she has "suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L.Ed.2d 700 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S. Ct. 1601, 1607, 60 L.Ed.2d 66 (1979). The case or controversy requirement is therefore closely related to the standing requirement. See *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 96 S. Ct. 1917, 1924, 48 L.Ed.2d 450 (1976); *San Francisco County Democratic Central Committee v. Eu*, 826 F.2d 814, 822 (9th Cir.1987). Both standards depend on whether Plaintiffs can demonstrate that they face a sufficiently "real and immediate" threat of prosecution under the McCarran-Walter provisions and Section 901 of the

FRAA. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 103, 103 S. Ct. 1660, 1665-66, 75 L.Ed.2d 675 (1983); *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S. Ct. 956, 959, 22 L. Ed. 2d 113 (1969).

In defining what constitutes a "real and immediate" threat, courts have contrasted this type of threat to one that is merely "conjectural or hypothetical," *Lyons*, 461 U.S. at 102, 103 S. Ct. at 1665; *Zwickler*, 394 U.S. at 109-10, 89 S. Ct. at 960-61 "imaginary and speculative," *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974), or "chimerical," *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L.Ed.2d 989 (1961). To allege a "real" threat in the First Amendment context, a plaintiff must show that the challenged law not only subjectively chills his First Amendment rights but also objectively chills them by threatening "specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13-14, 92 S. Ct. 2318, 2325-26, 33 L.Ed.2d 154 (1972). What constitutes an "immediate" threat of prosecution has been the subject of dispute between the parties.

The Government contends that "immediate" means "now"; in other words, the threat's immediacy must be exceptionally great and a plaintiff must be facing imminent charges and an almost certain conviction. Gov't Memo. of Nov. 9, 1988, at 1-4. Plaintiffs argue that "immediate" refers to the chilling effect on a plaintiff's First Amendment rights that occurs whenever a plaintiff faces a real threat of prosecution. Plaintiff Supp. Memo. of Nov. 14, 1988, at 2-3. The question thus framed is whether Plaintiffs must face a threat of an "immediate prosecution" or whether they satisfy the "immediate" requirement by alleging

an "immediate chill" from a threat of a credible, potential prosecution.

We believe that the terms "immediate prosecution" and "immediate chill" are inextricably intertwined. In any given situation, the more "immediate" the threat of prosecution, the more "immediate" the chill. See *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir.1987). A pre-enforcement First Amendment challenge does not necessarily require a plaintiff to confront a threat of prosecution the next day, the next week or the next month to have standing. The threat of prosecution just cannot be too remote in the future to no longer be real and objectively-based. Thus, if any member of the Other Six demonstrates that he or she faces a sufficiently real and immediate threat of prosecution under the challenged statutes that immediately chills him or her from exercising his or her First Amendment rights, the threat of prosecution will be considered suitably "real and immediate" to satisfy the standing and Article III case or controversy requirements.

The Government avers that none of the Other Six faces a real and immediate threat of prosecution under the McCarran-Walter provisions and Section 901(b) of the FRAA and that they should therefore be denied standing. Specifically, the Government maintains that in the past thirty-six years, the McCarran-Walter provisions have rarely been invoked. It is too speculative, it argues, to believe that it would charge the Other Six under the McCarran-Walter provisions after such charges have already been brought and dropped. The Other Six are already alleged to be deportable on the basis of routine immigration status

violations.⁶ There would be no reason for the Government to pursue the far more complex and time-consuming course of bringing McCarran-Walter provisions charges against them. Hence, the Government argues, any chill the Other Six might be suffering is too subjective and remote given the unlikelihood that the Government will prosecute under these charges. Gov't Memo. of Sept. 2, 1988 at 8.

In order to estimate whether a party faces a real and immediate threat of prosecution and chill of his or her First Amendment rights, courts have examined the government's interest in enforcing the challenged statute, along with its past enforcement patterns, and the party's interest in engaging in the prohibited activity. See *Hardwick*, 760 F.2d at 1205; *American Baptist Churches in the U.S.A. v. Meese*, 666 F. Supp. 1358, 1363 (N.D. Cal. 1987).

The Government in this case has demonstrated that it has an interest in excluding and deporting PFLP members generally and enforcing the McCarran-Walter provisions against alleged PFLP members and the Other Six specifically. Over the last two and a half years, the Government has engaged in exclusion and deportation actions against aliens who it alleged were PFLP members. For instance, in May 1986 the Government excluded and deported Suliemann Shehadeh under Sections 212(a)(27) and 212(a)(29) of

⁶ Bashar Amer, Aiad Khaled Barakat, Julie Nuangugi Mungai, Naim Nadim Sharif, Amjad Mustafa Obeid, and Ayman Mustafa Obeid have been served with Orders to Show Cause that include a charge under 8 U.S.C. § 1251(a)(2) that each "overstayed" his or her visa term. Bashar Amer's Order to Show Cause additionally charged him with failing to maintain student status under 8 U.S.C. § 1251(a)(9).

the Immigration and Nationality Act because of his affiliation with the PFLP. Decision of Immigration Judge, File No. 838-399-412 (May 22, 1986). The Government has further initiated summary exclusion proceedings in December 1987 under 8 U.S.C. § 1225(c) against Fouad Rafeedie, a permanent resident alien, because of his PFLP affiliation. Notice of Initiation of Summary Exclusion under Section 235(c), File No. 34-679-905 (December 31, 1987); *see Rafeedie v. INS*, 688 F. Supp. 729 (D.D.C.1988).

The Government's desire to utilize the McCarran-Walter provisions against PFLP members is manifested in its current attempt to deport Hamide and Shehadeh for violating Section (F)(iii) by being members of or affiliating with an organization that advocates or teaches the unlawful damage, injury or destruction of property. In particular, the Government has based these charges on Hamide and Shehadeh's alleged membership or affiliation with the PFLP. *In re Shehadeh*, File No. A30-660-528 (April 28, 1987) (Substituted Charges of Deportability); *In re Hamide*, File No. A19-262-560 (April 28, 1987) (Substituted Charges of Deportability).

While the Other Six need not allege a specific threat of prosecution against them individually to have standing, *Hardwick*, 760 F.2d at 1205, in this case they can. The Government has expressly stated that it considers the Other Six to fall within the class of persons who are properly deportable under the McCarran-Walter provisions. This is evidenced by the statement of former F.B.I. Director William H. Webster who, in the 1987 hearings concerning the confirmation of his nomination to be Director of Central Intelligence, declared: "[A]ll of them [the

Other Six, Hamide and Shehadeh] were arrested because they are alleged to be members of a worldwide Communist organization which under the McCarran Act makes them eligible for deportation . . . in this particular case if these individuals had been United States citizens, there would not have been a basis for their arrest." *Hearings Before the Senate Select Committee on Intelligence on Nomination of William H. Webster, to be Director of Central Intelligence*, 100th Cong. 1st Sess. 94, 95 (April 8, 9, 30 1987; May 1, 1987).

In addition to stating its prosecutorial interest against the Other Six, the Government has already brought charges against them under the McCarran-Walter provisions in January, 1987, dropping the charges over twelve weeks later at the April 23, 1987 hearing before the Court. The Government has not disavowed its intent to bring these same charges against the Other Six in the future despite ample opportunity to do so.

As for the Other Six, we must assess their interest in engaging in the type of First Amendment actions deemed deportable under the McCarran-Walter provisions. The Other Six allege that but for the McCarran-Walter provisions and Section 901(b) of the FRAA, they would engage in the expressive activities that led the INS to charge them under the McCarran-Walter provisions in 1987. *See Mungai Supp. Declaration* ¶ 6; *Amer Declaration* ¶ 4; *Amjad Obeid Declaration* ¶¶ 4-5; *Barakat Declaration* ¶¶ 4-5. These activities include reading and distributing magazines published by the PFLP, supporting or discussing the PFLP or its views in public meetings and demonstrations, and raising money to support these activities.

See Second Amended Complaint ¶ 22. While a plaintiff hoping to challenge a statute might tend to exaggerate his or her intention to participate in the proscribed actions, we believe that the Other Six do not allege their desire to pursue the First Amendment activities prohibited by the McCarran-Walter provisions merely as a ruse to obtain standing. On the contrary, after reading the submitted declarations, we find that the Other Six demonstrate an authentic interest in participating in the prohibited First Amendment activities as part of their normal course of activity. See *Hardwick*, 760 F.2d at 1205.

After examining the parties' interests, we conclude that the Government has demonstrated a strong interest in prosecuting PFLP members under the immigration laws generally and the Other Six and other PFLP members under the McCarran-Walter provisions in particular. The Other Six have evinced a genuine interest in engaging in the proscribed conduct. Under these circumstances, the Other Six confront a sufficiently real and immediate threat of prosecution under the McCarran-Walter provisions to establish their standing to challenge these provisions.

In addition to the interest analysis conducted above, relevant case law supports the Other Six's standing. In *Hardwick*, *supra*, the State arrested and charged plaintiff Hardwick, a practicing homosexual, with violating Georgia's sodomy statute, only to subsequently drop these charges. The *Hardwick* Court found that though the State had dropped the charges, the State had not declared that it would not prosecute Hardwick in the future under the challenged law. Viewing the evidence of past prosecution as raising a

strong inference that future prosecutions were likely, the Court concluded that Hardwick had standing to contest Georgia's sodomy statute. *Hardwick*, 760 F.2d at 1205 ("[a] past enforcement effort often will confirm the reasonableness of a plaintiff's subjective fear of prosecution"). Similarly, in this case, the past prosecution of the Other Six confirms the reasonableness of their fear of prosecution and raises a strong inference that future prosecutions are likely.

Distinguishing *Hardwick* from this case, the Government argues that Hardwick did not face any alternate sodomy charges other than those under the challenged sodomy law. The inference was strong in that case that future prosecutions under the challenged sodomy law would be likely because no other sodomy law existed under which Hardwick could have been prosecuted. Here, the Other Six currently face routine status deportation charges, making future prosecutions under the McCarran-Walter provisions too remote and unlikely.

In *Hardwick*, however, the Court granted Hardwick standing even though he did not allege other specific instances of prosecution of similarly situated homosexuals under the challenged sodomy law. To that extent, the Other Six present a more real and immediate threat of prosecution, relying not just on their previous prosecution but also on the current prosecutions against Hamide and Shehadeh. See *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S. Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974) (where plaintiff had not been arrested under the statute, the prosecution of his companion under the statute is "ample demonstration that [plaintiff's] concern with arrest has not been

'chimerical,' citing *Poe v. Ullman*, 367 U.S. 497, 508, 81 S. Ct. 1752, 1758, 6 L. Ed. 2d 989 (1961)).

Furthermore, the Government, like the State in *Hardwick*, has not disavowed its intent to enforce the challenged provisions. See *Hardwick*, 760 F.2d at 1206; see also *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 108 S.Ct. 636, 642, 98 L. Ed. 2d 782 (1988) (standing found for booksellers because, *inter alia*, "[t]he State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise"); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302, 99 S. Ct. 2301, 2311, 60 L.Ed.2d 895 (1979) (standing upheld for unions because, *inter alia*, "the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices"). Nor has the Government claimed that it has *never* enforced these provisions despite aliens "commonly and notoriously" violating them. Only where the Government has met one or both of these conditions, disavowal of intent to enforce or complete nonenforcement in the face of common and notorious violations, have courts found that the threat of prosecution was not real and immediate. Compare *Poe v. Ullman*, 367 U.S. at 502, 508, 81 S. Ct. at 1755, 1758 (threat of prosecution under Connecticut law banning contraceptives held "chimerical" because the ban had never been enforced during its over seventy-five year history even though contraceptives were commonly and notoriously sold in Connecticut drug stores); with *San Francisco Democratic Central Committee v. Eu*, 826 F.2d 814, 822 (9th Cir. 1987) (standing found despite State's total nonenforcement of challenged Election Code provi-

sions because no record shown that provisions were commonly and notoriously violated).

Where plaintiffs genuinely allege that but for the challenged statute, they would engage in the proscribed First Amendment activities, courts have granted them standing even when the statute has never been enforced or has never been enforced against them. In the first category where a statute has never been enforced against anyone, the Supreme Court has recognized a plaintiff's standing to contest the statute. See *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 108 S. Ct. 636, 642, 98 L. Ed. 2d 782 (1988) (conferring standing to booksellers to challenge never-enforced statute restricting display of sexually explicit literature); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988) (granting standing to newspaper publisher to contest never-enforced municipal ordinance requiring licensing for placement of newsracks on public property). The Ninth Circuit reached a similar conclusion in *San Francisco Democratic Central Committee, supra*. In that case, the Court determined that the plaintiffs had standing to lodge a First Amendment challenge to various sections of the California Elections Code even though the State had never invoked these sections against any political organization. The Court specifically relied on the Supreme Court's decision in *Epperson v. Arkansas*, 393 U.S. 97, 101-02, 89 S. Ct. 266, 268-69, 21 L. Ed. 2d 228 (1968), where a teacher was granted standing to challenge a statute prohibiting the teaching of evolution, even though the statute had never been enforced against anyone during its forty years on the record

books. *San Francisco Democratic Central Committee*, 826 F.2d at 822.⁷

In the second category, courts have conferred standing on plaintiffs to challenge statutes that impinge on their constitutional rights, even though those plaintiffs had never been personally subjected to prosecution under the statutes. This type of pre-enforcement challenge, the type of challenge at issue in the instant case, allows a plaintiff to contest a statute without having to expose himself to an actual arrest or prosecution or deportation. See *Babbitt*, 442 U.S. at 298-99, 99 S. Ct. at 2308-09 (upheld pre-enforcement challenge to provisions of the Arizona farm labor statute despite plaintiffs never having been charged under the provisions); *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974) (sustained pre-enforcement First Amendment challenge to Georgia criminal trespass law for a plaintiff never prosecuted under the statute); *Doe v. Bolton*, 410 U.S. 179, 188, 93 S. Ct. 739, 745, 35 L.Ed.2d 201 (1973) (allowed pre-enforcement challenge by doctors to Georgia abortion statute "despite the fact

⁷ The *San Francisco Democratic Central Committee* Court further noted that "the aftermath of *Poe* teaches that federal courts should not lightly determine that a statute has fallen into desuetude." 826 F.2d at 822 n. 15. Compare *Poe v. Ullman*, *supra*; with *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L.Ed.2d 510 (1965) (Connecticut statute banning contraceptives that the Supreme Court found a dead letter in *Poe* struck down after the State prosecuted two persons, including a doctor, for openly counseling married persons on the use of contraceptives). Similarly, in this case, though the Government has rarely used the McCarran-Walter provisions in their thirty-six year history, it has recently resurrected these provisions for use against PFLP members.

that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes"); *Sable Communications of California, Inc. v. FCC*, 827 F.2d 640, 643-44 (9th Cir. 1987) (permitted pre-enforcement First Amendment challenge to federal obscene telephone call statute by a plaintiff whom the State had never prosecuted under the statute); *Polykoff v. Collins*, 816 F.2d at 1331 (upheld pre-enforcement challenge to Arizona criminal obscenity statute where plaintiffs had never been prosecuted).

Particularly with pre-enforcement First Amendment challenges, courts have found standing based, in part, on their sensitivity to the danger of "self-censorship[,] a harm that can be realized even without an actual prosecution." *American Booksellers*, 108 S.Ct. at 642; see *Dombrowski v. Pfister*, 380 U.S. 479, 487, 85 S. Ct. 1116, 1121, 14 L.Ed.2d 22 (1965) ("[t]he threat of sanctions may deter [the lawful exercise of First Amendment rights] ... almost as potently as the actual application of sanctions'" (quoting *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963))); *Polykoff, supra* (plaintiffs granted standing to lodge a pre-enforcement First Amendment challenge because, *inter alia*, the chilling of protected speech under Arizona's statutory system for obscenity would be "immediate").

The Other Six have demonstrated that the Government has used the McCarran-Walter provisions to quell their First Amendment activities in the past, is currently prosecuting other alleged PFLP members under these provisions, and has not disavowed its intent to prosecute the Other Six in the future. As such, they present a stronger case for standing than

did the plaintiffs in *American Booksellers, Lakewood, Epperson*, and *San Francisco Democratic Central Committee* where the statute at issue had never been enforced. The standing of the Other Six is also more compelling than the plaintiffs' standing in *Babbitt, Steffel, Doe, Polykoff*, and *Sable* where the plaintiffs had never been prosecuted under the challenged statute.

We agree with the Government that were the Other Six only to allege a "subjective chill" based on the mere existence of the McCarran-Walter provisions and Section 901(b) of the FRAA without anything more concrete, they would not be entitled to standing. See *Laird v. Tatum*, 408 U.S. at 10-14, 92 S. Ct. 2318, 2324-26, 33 L.Ed.2d 154 (denied standing to plaintiff who alleged "subjective chill" of First Amendment rights due to mere existence, without more, of a governmental investigative and data-gathering activity); *Younger v. Harris*, 401 U.S. 37, 41-42, 91 S. Ct. 746, 749-50, 27 L.Ed.2d 669 (1971) (denied standing to plaintiffs who did not claim that they had ever been threatened with prosecution, that a prosecution was likely, or even that a prosecution was remotely possible); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378-81 (D.C. Cir. 1984) (denied standing to plaintiffs who did not adequately aver that any specific action is threatened or even contemplated against them; their alleged harms constituted "nothing more than a generalized grievance against the intelligence-gathering methods sanctioned by the President"); *Hardwick*, 760 F.2d at 1206 (rejected standing of Does, the heterosexual couple, because they did not allege a realistic threat of prosecution, only that the existence of the sodomy

statute plus Hardwick's arrest chilled their actions). Unlike the plaintiffs in *Laird, Younger, United Presbyterian Church*, and *Hardwick*, however, the Other Six have not only claimed that they are chilled from the statutes in question but that they face a "very real threat" of prosecution under these statutes. Mungai Supp. Declaration ¶ 3. This "very real threat" of prosecution is substantiated by past and present concrete instances of prosecution under the McCarran-Walter provisions. In contrast to the plaintiffs in *Lyons*, 461 U.S. at 105-08, 103 S. Ct. at 1666-68 (recurrence of allegedly unlawful police treatment of plaintiff found too speculative to warrant standing), *Rizzo v. Goode*, 423 U.S. 362, 372, 96 S. Ct. 598, 604-05, 46 L.Ed.2d 561 (1976) (same), and *O'Shea v. Littleton*, 414 U.S. 488, 493-97, 94 S. Ct. 669, 674-75, 38 L.Ed.2d 674 (1974) (same), the Other Six have properly established the "reality of the threat of repeated injury," *Lyons*, 461 U.S. at 107 n. 8, 103 S. Ct. at 1668 n. 8 (emphasis in original).

Moreover, while both the *Laird* and *United Presbyterian Church* courts denied standing, they acknowledged that standing would exist where "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging." *Laird*, 408 U.S. at 11, 92 S. Ct. at 2324; *United Presbyterian Church*, 738 F.2d at 1378 (quoting *Laird*). The Ninth Circuit relied on this distinction to find standing in *Sable Communications of California, supra*. In that case, the Court granted the plaintiff pre-enforcement standing to challenge a statute regulating sexually

explicit telephone services. The Court noted that the government considered the statute to be applicable to the plaintiff, that the government specifically declined to agree not to enforce the statute against the plaintiff, that the penalties for noncompliance were substantial, and that the government had prosecuted one of the plaintiff's competitors under the statute. Under these circumstances, the Court found that the statute was compulsory in nature and that the plaintiff was currently subject to its requirements. *Sable*, 827 F.2d at 643-44.

In the case at bar, as in *Sable*, the Government considers the McCarran-Walter provisions and Section 901(b) of the FRAA to be applicable to the Other Six⁸ and has specifically refused to state that it will not bring such charges against them. The penalty for the statute's violation—deportation—is substantial, and the Government is proceeding against two other alleged PFLP members under the statute. As in *Sable*, the challenged provisions are compulsory as well as proscriptive in nature. As aliens, the group directly targeted by the statute, the Other Six are presently subject to the statute's requirements. See *Doe v. Bolton*, 410 U.S. at 188, 93 S. Ct. at 745 (pre-enforcement standing found for doctors, "against

⁸ Since the Government has expressly stated at oral argument and in its briefs, see e.g., Gov't Memo. of Sept. 2, 1988, at 29-31, that it considers the PLO Exception to apply to PFLP members, we do not reach the issue of whether the PLO Exception encompasses solely PLO members or affiliate groups' members as well. The fact that the Government treats PFLP members as within Section 901(b)'s exception to Section 901(a)'s constitutional protections heightens the reality and immediacy of the threat of prosecution faced by alleged PFLP members, like the Other Six, under the McCarran-Walter provisions.

whom these criminal statutes directly operate"). Hence, like in *Sable*, the threat of prosecution facing the Other Six is not too "speculative" or "hypothetical," *Sable*, 827 F.2d at 643, to warrant the invocation of federal jurisdiction.

Under the above analysis, we conclude that each member of the Other Six faces a "real and immediate" threat of prosecution under the McCarran-Walter provisions and Section 901 of the FRAA. They therefore present an objectively-based and "immediate" chill of their First Amendment rights sufficient to provide them with standing.

C. Organizational Plaintiffs

In *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988), the Supreme Court reiterated its test set forth in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), for determining whether an organization has standing to sue on behalf of its members. Under that test, an organization has standing "when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *New York State Club*, 108 S. Ct. at 2231-32 (quoting *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441).

The Court holds that the ADC has met the three-part *Hunt* test for associational standing. Under the first prong of the test, an organization must allege "that its members, or any one of them, are suffering immediate or threatened injury as a result of the

challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . ." *Hunt*, 432 U.S. at 342, 97 S. Ct. at 2441 (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343 (1975)). Applying the same analysis to the ADC's members as was used to measure whether the Other Six faced a real and immediate threat of prosecution, we find that the ADC's members confront a similar threat of prosecution under the McCarran-Walter provisions and Section 901(b) of the FRAA.

The ADC represents both immigrant and nonimmigrant aliens who would support the PFLP and hold PFLP views but for the real threat that the INS would institute deportation proceedings against them under the McCarran-Walter provisions. Mokhiber Fifth Declaration ¶ 2 (Mokhiber is currently the Director of the Legal Services Department of the ADC). After reading the submitted declarations, we view these ADC members' desire to engage in the proscribed activities as genuine. Moreover, the Government demonstrates a continuing interest in enforcing the McCarran-Walter provisions against these members. This interest is evidenced by the Government's past prosecutions against alleged PFLP members (Sulimann Shihadeh and Fouad Rafeedie), its past prosecution of the Other Six as alleged PFLP members under the McCarran-Walter provisions, its current enforcement of one of the McCarran-Walter provisions against Hamide and Shehadeh for their alleged PFLP membership, and its refusal to disavow its intent to enforce these provisions in the future. *Compare Hardwick*, 760 F.2d at 1206 (heterosexual couple denied standing where

court could determine that a heterosexual couple was in a different position from a homosexual when the State had only demonstrated an interest in prosecuting homosexuals under the sodomy statute); *Younger v. Harris*, 401 U.S. at 41-42, 91 S. Ct. at 748-49 (three intervenors denied standing because they never claimed to be threatened with prosecution under the challenged statute or that a prosecution was likely or even remotely possible). Unlike the Other Six, the ADC members do not face routine deportation charges for status violations; this lack of an alternative avenue through which the Government could deport them heightens the reality and immediacy of the threatened prosecution under the McCarran-Walter provisions. Therefore, the ADC members would have standing to sue in their own right.

Under the second prong of the *Hunt* test, the interest the organization seeks to protect must be germane to the organization's purpose. The Government avers that the ADC merely has an "abstract and unconnected concern" with respect to the McCarran-Walter provisions since its purpose is not to violate these provisions. Gov't Memo. of Sept. 2, 1988, at 16. While the ADC does not define its purpose in terms of violating deportation laws, it does state its purpose to be the defense of the rights and promotion of the heritage of Arab-Americans through legal action in cases of discrimination and immigration and publication of information on issues of concern to Arab-Americans. Second Amended Complaint ¶ 7. Since the interests the ADC seeks to protect in this case are the constitutional rights for its Arab-American members, including immigrant aliens and nonimmigrant aliens, to engage in First Amendment activities

proscribed by the McCarran-Walter provisions, we find that these interests are germane to the ADC's purpose.

Under the third prong, we find that the claims for declaratory and injunctive relief asserted by the ADC do not require the participation of the individual members in the lawsuit. In a facial challenge such as this, "there is complete identity between the interest of the [ADC] and those of its member [s] . . . with respect to the issues raised in this suit, and the necessary proof [can] be presented 'in a group context.'" *New York State Club*, 108 S. Ct. at 2232 n. 4 (quoting *Hunt*, 432 U.S. at 344, 97 S. Ct. at 2442). The ADC thus meets the Hunt criteria for associational standing.

In addition, because the ADC represents immigrant aliens as well as nonimmigrant aliens, the ADC presents a sufficiently different claim than the Other Six to warrant its standing. In contrast to the nurse, clergy, social worker and corporation-appellants in *Doe v. Bolton*, 410 U.S. at 189, 93 S. Ct. at 746, whose standing the Supreme Court rejected because their claims were already sufficiently presented by the other plaintiffs, the immigrant alien ADC members state non-duplicative claims. We conclude that the ADC enjoys standing to challenge the McCarran-Walter provisions and Section 901(b) of the FRAA.⁹

⁹ We find that the other Organizational Plaintiffs—Arab-American Democratic Federation, Association of Arab American University Graduates, Irish National Caucus, Palestine Human Rights Campaign, American Friends Service Committee, League of United Latin American Citizens, Michel Bogopolsky, Darrel Meyers, and Southern California Interfaith Task Force on Central America—have not presented sufficient

D. Prudential Considerations

Notwithstanding the Other Six's and the ADC's standing under Article III, the Government submits that the Court should refrain from determining the constitutionality of the McCarran-Walter provisions and Section 901 of the FRAA for prudential considerations. First, the Government asserts that the Ninth Circuit has exclusive jurisdiction to review final orders of deportation under 8 USC § 1105a. Second, the Ninth Circuit has already stated in *Hamide v. United States District Court*, *supra*, that it will not rule on the constitutionality of Section (F)(iii), under which Hamide and Shehadeh are being prosecuted, because they have not exhausted their administrative remedies. Third, by ruling on the Other Six's and the ADC's constitutional attacks on the McCarran-Walter provisions, this Court would be thwarting Congress's intent to place exclusive jurisdiction in the Ninth Circuit and to have no court review the deportation proceedings until a factual record has been developed at the deportation hearing. Fourth, if this Court proceeded to adjudicate their claims, it would create parallel tracks of litigation between itself and the Ninth Circuit, inefficiently use judicial resources, and create the possibility of conflicting decisions. Fifth, it would be anomalous to allow the Other Six or the ADC to challenge the statutes at issue when the only parties currently charged under those statutes, Hamide and Shehadeh, have been foreclosed from mounting such a challenge before this Court. *See Gov't Memo. of Sept. 2, 1988*, at 4-7, 17-20.

evidence to meet the three prongs of the Hunt test and consequently deny them standing.

While the Court in its May 21, 1987 and June 3, 1987 Orders dismissed Hamide and Shehadeh's claims and stayed the Other Six's and the ADC's claims for prudential considerations, such considerations are no longer applicable. In our previous Orders, we specifically relied on Hamide and Shehadeh's ability to seek a preemptory writ of mandamus from the Ninth Circuit to rule on the constitutionality of Section (F)(iii). The Ninth Circuit sanctioned such a procedure in *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 630 (9th Cir. 1985).

The Government contends that *Bonneville Power* is dispositive on the prudential considerations now before the Court. It argues that "where a statute commits review of final agency action to the court of appeals [even in the absence of an express statutory command of exclusiveness], any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review," and a district court's jurisdiction under the general federal question statute (28 U.S.C. § 1331) is preempted. Gov't Memo. of Sept. 2, 1987, at 18-19 (emphasis in Gov't Memo.) (quoting *Bonneville Power*, 767 F.2d at 627). That case, however, dealt with plaintiffs involved in ongoing agency proceedings ultimately reviewable by the court of appeals. The Ninth Circuit held that these plaintiffs could not contest their ongoing proceedings in a district court because the court of appeals retained exclusive jurisdiction over the proceedings. See also *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (court of appeals has exclusive jurisdiction over claim that ongoing administrative proceeding is

unreasonably delayed); *Air Line Pilots Ass'n Int'l v. CAB*, 750 F.2d 81 (D.C. Cir. 1984) (same).

In the case at bar, the Other Six and the ADC are not engaged in any ongoing proceedings that would allow them to challenge the McCarran-Walter provisions or Section 901 of the FRAA; the Other Six's deportation proceedings are only for routine status violations. Thus, unlike Hamide and Shehadeh, the Other Six and the ADC do not have any administrative remedies to exhaust with respect to the McCarran-Walter provisions and Section 901 of the FRAA. They are not involved in any ongoing proceedings under the statutes at issue as were the plaintiffs in *Bonneville Power*, *Telecommunications Research & Action Center*, and *Air Line Pilots* and consequently do not have to forsake district court adjudication of their claims.

Contrary to the Government's argument, the fact that Hamide and Shehadeh are involved in ongoing deportation proceedings under Section (F)(iii) and can only seek review through the Ninth Circuit does not preclude a district court from granting the Other Six and the ADC pre-enforcement standing to challenge the McCarran-Walter provisions. Courts have not abstained from hearing a plaintiff's suit because another plaintiff's action was pending in another forum. See, e.g., *Steffel*, 415 U.S. at 459, 94 S. Ct. at 1215-16 (allowed pre-enforcement standing despite plaintiff's companion being prosecuted under the same statute); *Sable*, 827 F.2d at 644 (granted pre-enforcement standing where "the government has, in fact, prosecuted one of Sable's Los Angeles-based competitors"); *Polykoff*, 816 F.2d at 1331 (found pre-enforcement standing where the State "was actively

prosecuting other owners of adult bookstores"). These cases reject the Government's theory that this Court, or for that matter any court in the United States, must desist from reviewing the McCarran-Walter provisions because of the fear of parallel tracks of litigation, inefficient use of resources, or conflicting decisions. Particularly with a First Amendment facial challenge, the type at issue here, abstention is inappropriate. See *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 488 (9th Cir. 1984) ("abstention by federal courts in first amendment cases could often result in the suppression of free speech that is meant to be protected by the Constitution"), *rev'd on the merits*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985). Comity principles also do not prevent this Court from hearing the claims of the Other Six and the ADC since these plaintiffs are not involved in ongoing proceedings under the provisions they seek to challenge. See *Steffel*, 415 U.S. at 462, 94 S. Ct. at 1217.

In an analogous case, *Sable Communications of California, supra*, the Ninth Circuit ruled that the district court erred when it abstained from analyzing the federal obscene telephone call statute, 47 U.S.C. § 223(b), even though the court of appeals had exclusive jurisdiction under 28 U.S.C. § 2342 to review the FCC's regulations made in accordance with the statute. 827 F.2d at 643. Similarly, in the instant case, we must not abstain from reviewing the constitutionality of the McCarran-Walter provisions and Section 901 of the FRAA even though the Ninth Circuit has exclusive jurisdiction to review Hamide and Shehadeh's final deportation orders.

Facing a real and immediate threat of deportation, but not an actual deportation, under the McCarran-Walter provisions and Section 901(b) of the FRAA, the Other Six and the ADC cannot bring their constitutional arguments before the Ninth Circuit. If this Court refused to rule on their claims, they would have no forum in which to challenge the constitutionality of these statutes. Because the threat of prosecution can be as effective as an actual prosecution, see *Dombrowski v. Pfister*, 380 U.S. at 486, 85 S. Ct. at 1120, the Government could effectively quell protected constitutional activity by threatening, but never instituting, deportation proceedings. The Other Six and the ADC would then be placed in the same untenable position as the plaintiff in *Steffel* where the Supreme Court stated:

[A] refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting [the] law and the Charybdis of foregoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.

415 U.S. at 462, 94 S. Ct. at 1217. Like the "hapless plaintiff" in *Steffel*, the Other Six and the ADC do not face any proceedings under the challenged statutes, and they believe that they have a constitutional right to engage in the proscribed activity. Consequently, they are unjustifiably caught between "the Scylla of intentionally flouting the law and the Charybdis of foregoing what [they] believe to be constitutionally protected activity in order to avoid becoming en-

meshed in a [deportation proceeding]."¹⁰ Having found that the ADC and each member of the Other Six have standing under Article III, we do not abstain from hearing their claims for prudential reasons. We now turn to the merits of their challenges.

II. MERITS

A. Aliens' First Amendment Rights in the Deportation Context

Before turning to the statutes at issue, we must address the Government's argument that aliens do not enjoy First Amendment rights in the deportation context. It has long been settled that aliens within the United States enjoy the protections of the First Amendment of the United States Constitution. *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n. 5, 73 S. Ct. 472, 477 n. 5, 97 L.Ed. 576 (1953); *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 1449, 89 L. Ed. 2103 (1945); *Bridges v. California*, 314 U.S. 252, 62 S. Ct. 190, 86 L.Ed. 192 (1941); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1222 (9th Cir. 1988); *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985); *Massignani v. INS*, 438 F.2d 1276, 1278 (7th Cir. 1971); *In re Weitzman*, 426 F.2d 439, 449 (8th Cir. 1970) (Blackmun, J.); *Narenji v. Civiletti*, 481 F.

¹⁰ As counsel for the Government represented at the October 24, 1988 hearing, it could easily take four years before Hamide and Shehadeh have their cases reviewed by a federal court. Reporter's Transcript of October 24, 1988, at 29, lines 11-13. Even then their cases could be resolved in any number of ways without addressing the constitutional claims that the Other Six and the ADC seek to raise here. During this lengthy period of time, the chill on the First Amendment rights of the Other Six and the ADC members would be such that abstention is inappropriate.

Supp. 1132, 1139 n. 5 (D.D.C.), *rev'd on other grounds*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957, 100 S. Ct. 2928, 64 L.Ed.2d 815 (1980).

Recently, the Ninth Circuit in *Verdugo-Urquidez* relied on Justice Murphy's concurrence in *Bridges v. Wixon* and concluded that "aliens within the United States enjoy the benefits of the first, fifth, sixth and fourteenth amendments." 856 F.2d at 1222 (emphasis supplied). The Court of Appeals emphasized that "aliens within the United States" include nonimmigrant aliens as well as permanent resident aliens. *Id.*¹¹

The Government concedes that aliens have First Amendment rights. Reporter's Transcript of April 27, 1987, at 10, lines 1-3. However, the Government argues that these First Amendment rights are drastically limited in the deportation context due to Con-

¹¹ The *Verdugo-Urquidez* Court found support for this conclusion in the Supreme Court's decision in *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L. d.2d 786 (1982) in which *illegal* aliens, i.e., aliens who could not establish that they had been legally admitted into the United States, were . . . were held to have rights under the Fourteenth Amendment. 856 F.2d at 1222. In *Plyler*, the Supreme Court rejected the argument that illegal aliens are not "persons within the jurisdiction" of the State of Texas, 457 U.S. at 210, 102 S. Ct. at 2391, and stated that "until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and the laws of the United States—[an illegal alien] is entitled to the equal protection of the laws that a State may choose to establish." 457 U.S. at 215, 102 S. Ct. at 2394 (emphasis supplied). Since none of the plaintiffs before the Court are here illegally, we do not reach the question of whether illegal aliens are protected by the First Amendment. Like the *Verdugo-Urquidez* Court, we simply draw no distinction between immigrant and non-immigrant aliens for First Amendment purposes.

gress' plenary power over immigration. To support this proposition, the Government relies on a long line of Supreme Court decisions beginning with a nineteenth century Chinese exclusion case, *Fong Yue Ting v. United States*, 149 U.S. 698, 13 S. Ct. 1016, 37 L.Ed. 905 (1893), through the 1950's cases, *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952), and *Galvan v. Press*, 347 U.S. 522, 74 S. Ct. 737, 98 L.Ed. 911 (1954), to the recent decisions in *Kleindienst v. Mandel*, 408 U.S. 753, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972), *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976), and *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L.Ed. 2d 50 (1977). The Court does not dispute this line of precedent establishing Congress' authority over immigration and the limited judicial review employed in those cases. However, as will be discussed below, only one of the Government's cases, *Harisiades*, involved a First Amendment challenge in the deportation setting. In that case, the Supreme Court applied the same First Amendment standard applicable to citizens.

1. The Constitutional Limits of Congress' Plenary Authority in the Immigration Arena

At first glance, the Government's authorities indicate that Congress has virtually absolute and unchecked power over immigration matters. In *Fong Yue Ting*, 149 U.S. at 724, 13 S. Ct. at 1026, the Supreme Court stated: "[A]liens, having taken no steps towards becoming citizens, . . . remain subject to the power of Congress to expel them, or to order them to be removed and deported from the country, whenever in its judgment their removal is necessary or expedient for the public interest." In *Carlson v.*

Landon, 342 U.S. 524, 534, 72 S. Ct. 525, 531, 96 L.Ed. 547 (1952), the Court declared: "So long . . . as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what noncitizens shall be permitted to remain within our borders." In *Galvan*, 347 U.S. at 531, 74 S. Ct. at 743, relied on in *Kleindienst*, 408 U.S. at 766-67, 92 S. Ct. at 2583-84, and *Fiallo*, 430 U.S. at 792-93 n. 4, 97 S. Ct. at 1478 n. 4, the Court opined: "[T]hat the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government."

Upon more careful reading, however, one can distill from these decisions the Supreme Court's recognition of the constitutional limitations to Congress' plenary immigration authority. The *Fong Yue Ting* Court elaborated that immigration power must be exercised "consistent[ly] with the Constitution" and the judiciary must intervene where "required by the paramount law of the Constitution." 149 U.S. at 712, 713, 13 S. Ct. at 1021, 1022. The *Carlson* Court observed that "[t]he power to expel aliens . . . is, of course, subject to judicial intervention under the 'paramount law of the Constitution'" 342 U.S. at 537, 72 S. Ct. at 532 (quoting *Fong Yue Ting*). And in *Galvan*, the Supreme Court noted that "since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen. . . ." 347 U.S. at 530, 74 S. Ct. at 742. Thus, even conceding Congress' authority in the immigration arena, we are not relieved of our duty

to ensure that Congress exercises its power within constitutional limits.

2. Government's Cases Not Involving First Amendment Challenges in the Deportation Setting

With the exception of *Harisiades*, the Government has not presented any case dealing squarely with an alien's First Amendment rights in the deportation context. Most of the cases involved Fifth Amendment due process challenges. See *Fong Yue Ting*, *supra* (Fifth Amendment due process challenge to an immigration law requiring deportation of Chinese laborers without certificates of residence); *Galvan*, *supra* (Fifth Amendment due process challenge to the Internal Security Act of 1950 providing for deportation of Communist Party members); *Mathews*, *supra* (Fifth Amendment due process attack on Social Security Act provisions granting eligibility for benefits to aliens under 65 years of age only if they have been admitted for permanent residence and have resided in the United States for five years); *Fiallo*, *supra* (Fifth Amendment due process challenge to Sections 101(b)(1), (b)(2) of the Immigration and Nationality Act denying preferential immigration status to illegitimate children and to fathers of illegitimate children); see also *Carlson*, *supra* (Fifth and Eighth Amendment challenge to provisions of the Internal Security Act of 1950 under which Communist Party members could be held in custody without bail).

In addition, several of the Government's "plenary power" cases centered on Congress' power to exclude aliens from our country's shores rather than its power to deport aliens lawfully residing in the coun-

try. Congress' power differs in the exclusion and deportation contexts. In the former, the government's decision to exclude an alien is all but conclusive on the courts, while in the latter an alien can look to the courts as a check on the government's power. The Supreme Court in *Kwong Hai Chew*, *supra*, elaborated on this distinction. Quoting Justice Murphy's concurrence in *Bridges v. Wixon*, 326 U.S. at 161, 65 S. Ct. at 1455 (Murphy, J., concurring), the Court stated: "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country, he becomes invested with the rights guaranteed by the Constitution to all people within our borders." 344 U.S. at 596-97 n. 5, 73 S. Ct. at 477 n. 5; see also *Verdugo-Urquidez*, 856 F.2d at 1222 ("an alien seeking admission to the United States enjoys no constitutional rights") (citing *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d 21 (1982); *United States ex rel. Turner v. Williams*, 194 U.S. 279, 292, 24 S. Ct. 719, 723, 48 L.Ed. 979 (1904)).

Four of the Government's cases fall into the exclusion category. First, in *Turner*, *supra*, an alien excluded for being an anarchist challenged his exclusion on the ground that it violated the First Amendment. The Supreme Court denied his challenge, commenting that "those who are excluded cannot assert rights in general obtaining in a land to which they do not belong. . . ." 194 U.S. at 292, 24 S. Ct. at 723 (emphasis supplied). Second, in *Kleindienst*, *supra*, United States citizens claimed that the government's exclusion of an alien violated the First Amendment. The Supreme Court ruled that "Mandel [a foreign journalist] personally, as an *unadmitted* and nonresi-

dent alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." 408 U.S. at 762, 92 S. Ct. at 2581 (emphasis supplied). Third, *Fiallo*, *supra*, involved a congressionally mandated exclusion that harmed citizens' interests. Reiterating language from *Oceanic Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 29 S. Ct. 671, 676, 53 L. Ed. 1013 (1909), the Supreme Court in *Fiallo* stated: "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." 430 U.S. at 792, 97 S. Ct. at 1477 (emphasis supplied). Fourth, the Ninth Circuit in *Adams v. Howerton*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111, 102 S. Ct. 3494, 73 L.Ed.2d 1373 (1982), faced the issue of whether Section 201 of the Immigration and Nationality Act of 1952, a preferential admissions standard based upon the existence of close family relationships, was unconstitutional as applied to the exclusion of one member of a homosexual couple. Upholding the law, the Ninth Circuit once again recognized Congress' broad exclusion powers, stating that "the power to *exclude* aliens is . . . a power to be exercised exclusively by the political branches of government." 673 F.2d at 1041 (emphasis supplied).

In all four cases above, the focus of the Supreme Court's inquiry was on the existence, or more appropriately, the nonexistence of alien's rights in the face of Congress' power to exclude. None addressed the issue before the Court today: the First Amendment rights of aliens in the deportation setting.

3. *Harisiades v. Shaughnessy*

Decided in 1952, *Harisiades v. Shaughnessy*, *supra*, involved an attack on the provision in the Alien Registration Act of 1940 that authorized deportation of aliens based on their past Communist Party memberships. The aliens assailed this provision on three grounds: the Fifth Amendment Due Process Clause, the First Amendment freedom of speech and assembly, and the prohibition of passing an *ex post facto* law under Article I, § 9, clause 3 of the Constitution.

The Supreme Court rejected the aliens' Fifth Amendment substantive due process arguments that permanent residence confers a "vested right" on the alien, equal to that of a citizen, to remain within the country and that the Alien Registration Act provision is unreasonably harsh. As it had done in previous cases, the Court deferred to the political branches in this area: "[Policies toward aliens] are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." 342 U.S. at 589, 72 S. Ct. at 519. The Government erroneously relies on language from *Harisiades*' Fifth Amendment discussion in support of its position that an alien's First Amendment rights are superceded in the deportation arena.

In addressing the aliens' First Amendment argument, the *Harisiades* Court dealt directly with the question of whether aliens have First Amendment rights in deportation matters. The Government, as in this case, urged the Court to find that the First Amendment does not apply "to the political decision of Congress to expel a class of aliens whom it deems

undesirable residents." 96 L.Ed. at 593 (quoting Brief for the United States). The Court rejected this argument, ruling that it had the duty of distinguishing between aliens' constitutionally protected "advocacy of political methods" and their unprotected "methodical but prudent incitement to violence." 342 U.S. at 592, 72 S. Ct. at 520. To make this distinction, the Court explicitly employed the then prevailing First Amendment test from *Dennis v. United States*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951). 342 U.S. at 592 n. 18, 72 S. Ct. at 520 n. 18. Although the Court found that the First Amendment did not prevent the resident aliens' deportation, the importance of its ruling for the instant case is that the Court applied the same First Amendment standard to aliens' claims that then applied to United States citizens' First Amendment challenges.¹²

¹² The Government's attempt to distinguish *Harisiades* is unpersuasive. It merely posits that the Court's ruling was not clear on its face and that it only utilized the test applicable to the Communist Party rather than the prevailing First Amendment test. In light of the Government's brief in *Harisiades* urging the Court not to apply First Amendment principles in the deportation context, the Court's recognition of its duty to distinguish between mere advocacy and speech that incites violence, and the Court's citation to *Dennis v. United States*, we must conclude that the Court found aliens in the deportation setting to have the same First Amendment rights as citizens. While several commentators have queried whether the Supreme Court correctly applied the *Dennis* test in *Harisiades*, see Legomsky, *Immigration and the Judiciary: Law and Politics in Britain and America* 202-05 (1987); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 Yale L.J. 262, 285 n. 153 (1959), we need not consider the Court's finding that the statute at issue survived First Amendment scrutiny. For our purposes, what is instructive is that the Court chose to

The *Harisiades* decision sets forth the proper analysis for examining constitutional challenges to deportation statutes. While the Court will defer to Congress's plenary immigration power in the substantive due process area, the Court will not accord Congress the same amount of deference in the First Amendment field. Had the *Harisiades* Court found that the Government's plenary immigration power required the same degree of judicial deference in all deportation challenges, it could have summarily dismissed the First Amendment attack in a sentence or two with a citation to its previous substantive due process discussion. Or the Court could have adopted in *toto* the language in Justice Frankfurter's concurrence that essentially abdicated all judicial responsibility for overseeing congressional actions in the deportation area. *Harisiades*, 342 U.S. at 596-98, 72 S. Ct. at 522-23 (Frankfurter, J., concurring). But the Court did not dismiss the First Amendment challenge in such a summary fashion. Instead, it addressed the aliens' First Amendment argument in a separate section and employed the *Dennis* test, the same First Amendment test then applicable to citizens. Thus, in the only case directly confronting aliens' First Amendment challenge to a deportation statute, the Supreme Court analyzed the aliens' claims in the same manner as if a citizen had brought the action.

4. *Harisiades* and the First Amendment

In *Harisiades*, the Supreme Court refused to recognize an alien-citizen distinction among speech and speakers in this country. This result accords

apply First Amendment principles in the face of an express Government argument that it need not do so.

with the "profound national commitment" reflected by the First Amendment that "debate on public issues [be] uninhibited, robust, and wide-open, and that it [include] vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 720-21, 11 L. Ed. 2d 686 (1964); *see also Associated Press v. United States*, 326 U.S. 1, 20, 65 S. Ct. 1416, 1424-25, 89 L.Ed. 2013 (1945) (First Amendment designed to receive "the widest possible dissemination of information from diverse and antagonistic sources").

The First Amendment serves our national interests not only by preserving individual rights to speech but by ensuring that all speech from whatever source is protected. The maintenance of the "uninhibited marketplace of ideas," crucial for our democracy's prosperity, *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390, 89 S. Ct. 1794, 1806-07, 23 L. Ed. 2d 371 (1969), requires that each idea be afforded the same protection whether espoused by a citizen or an alien within this country. The Supreme Court affirmed this principle in the context of rejecting a different standard for a corporation's speech in *Pacific Gas & Electric v. California Public Utilities Commission*, 475 U.S. 1, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) (plurality). The Court there stated that "[t]he constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . The identity of the speaker is not decisive in determining whether speech is protected." *Id.* at 8, 106 S. Ct. at 907 (quoting *First National Bank v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 1415, 55 L.Ed.2d 707

(1978)). Aliens in this country, like corporations or individuals, "contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to further." *Id.* (quoting *Bellotti*, 435 U.S. at 783, 98 S. Ct. at 1419). Congress has acknowledged that "It is not in the interests of the United States to establish one standard of ideology for citizens and another for foreigners who wish to visit the United States." H. Conf. Rep. No. 100-475, 100th Cong., 1st Sess. 163, *reprinted in* 1987 U.S. Code Cong. & Admin. News 2314, 2370, 2424. As Judge Learned Hand stated, the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

If corporate speech is protected for its contribution to vigorous public debate, then the speech of aliens must receive similar protection. For it defies reason and undermines the values underlying the First Amendment that a magazine article advocating doctrines of world communism or the unlawful damage, injury or destruction of property by the PFLP would be fully protected if published by a corporation or a citizen, but if authored or distributed by an alien could render the alien subject to the sanction of deportation.

5. No Different Bill of Rights for Aliens in the Deportation Setting

In the Government's view, a fundamentally "different" Bill of Rights applies to aliens seeking to avoid expulsion from the United States. The Gov-

ernment would have this Court rule that "in the limited context of deportation, the guarantees of the Bill of Rights are constitutionally irrelevant to the question of which non-citizens shall be permitted to remain within our borders." Gov't Supp. Memo. of May 19, 1987, at 27. To buttress this view, the Government cites a litany of decisions in which courts have limited aliens' constitutional rights in the deportation setting.¹³ From these cases the Govern-

¹³ *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39, 104 S. Ct. 3479, 3483-84, 82 L.Ed.2d 778 (1984) (Fourth Amendment based exclusionary rule); *Abel v. United States*, 362 U.S. 217, 233-34, 80 S. Ct. 683, 694-95, 4 L.Ed.2d 668 (1960) (arrests upon judicial warrant [an administrative order being sufficient]); *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1141 (9th Cir. 1981) (dismissal of proceedings resting upon constitutionally defective arrest); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-54, 44 S. Ct. 54, 55-56, 68 L.Ed. 221 (1923) (Fifth Amendment privilege against self-incrimination); *INS v. Lopez-Mendoza*, 468 U.S. at 1043-44, 104 S. Ct. at 3485-86 (same); *Smith v. INS*, 585 F.2d 600, 602 (3d Cir. 1978) (same); *Trias-Hernandez v. INS*, 528 F.2d 366, 368-69 (9th Cir. 1975) (Fifth Amendment based right to "Miranda" warnings prior to custodial interrogation); *Bridges v. Wixon*, 144 F.2d 927, 936 (9th Cir. 1944) (Fifth Amendment protection against double jeopardy), *rev'd on other grounds*, 326 U.S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1945); *LeTourneur v. INS*, 538 F.2d 1368, 1370 (9th Cir. 1976) (Fifth Amendment based right to adjudication by an independent judicial officer), *cert. denied*, 429 U.S. 1044, 97 S. Ct. 748, 50 L.Ed.2d 757 (1977); *United States v. Dekermenjian*, 508 F.2d 812, 814 (9th Cir. 1974) (Fifth and Sixth Amendment based protection against in absentia adjudications); *Jay v. Boyd*, 351 U.S. 345, 357 n. 21, 360-61, 76 S. Ct. 919, 926 n. 21, 928-29, 100 L.Ed. 1242 (1956) (Fifth and Sixth Amendment based protection against discretionary adjudications based on undisclosed information); *Suciu v. INS*, 755 F.2d 127 (8th Cir. 1985) (same); *Carlson v. Landon*, 342 U.S. 524, 537, 72 S. Ct. 525, 532-33, 96 L.Ed. 547 (1952) (Sixth Amendment trial by jury);

ment would have us conclude that while aliens have First Amendment rights generally, within the deportation forum these rights are "irrelevant" and can be severely circumscribed. We find that none of the Government's cases supports this broad and far-reaching proposition.

In determining that a particular constitutional provision did not apply in the deportation context, the courts did not rely on a "different" Bill of Rights for aliens; nor did they base their decisions on the Government's plenary immigration power. Rather, each decision was based upon the court's examination of the precedent interpreting the particular constitutional right at issue and upon its conclusion that the particular right had no application in the deportation setting. The results would be the same in analogous situations outside the immigration arena.

Many of the cases dismissed constitutional challenges on the ground that the right asserted was available only in *criminal* proceedings. Since deportation has always been held to be a civil proceeding, *see Lopez-Mendoza*, 468 U.S. at 1038, 104 S. Ct. at 3483 ("A deportation proceeding is a purely civil

Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977) (Sixth Amendment right to counsel); *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969) (Sixth Amendment based protection against interrogation in the absence of counsel), *cert. denied*, 400 U.S. 854, 91 S. Ct. 72, 27 L.Ed.2d 92 (1970); *Carlson v. Landon*, 342 U.S. at 544-56, 72 S.Ct. at 536-42 (Eighth Amendment protection against excessive bail); *Chabolla-Delgado v. INS*, 384 F.2d 360 (9th Cir. 1967) (Eighth Amendment based bar to expulsion as cruel and unusual punishment), *cert. denied*, 393 U.S. 865, 89 S. Ct. 147, 21 L. Ed. 2d 133 (1968); *Galvan v. Press*, 347 U.S. 522, 531, 74 S.Ct. 737, 742-43, 98 L.Ed. 911 (1954) (Article I, § 9 protection against ex post facto laws).

action to determine eligibility to remain in this country, not to punish an unlawful entry . . ."), the alien could not make a successful challenge.¹⁴ Citizens, too, are not entitled to these rights in the civil context.¹⁵

¹⁴ See *Bilokumsky*, 263 U.S. at 155, 44 S.Ct. at 56 ("since the [deportation] proceeding was not a criminal one," Fifth Amendment privilege of criminal defendant not to testify does not apply); *Lopez-Mendoza*, 468 U.S. at 1043-44, 104 S. Ct. at 3485-86 (same); *Smith*, 585 F.2d at 602 (same); *Trias-Hernandez*, 528 F.2d at 368-69 ("civil nature of deportation proceeding is significant" in court's determination that *Miranda* warning are not necessary prior to custodial interrogation); *Bridges*, 144 F.2d at 936 ("The principle of double jeopardy applies only to criminal proceedings"); *Ramirez*, 550 F.2d at 563 (in holding that Sixth Amendment's guarantee of the right to counsel is not applicable to deportation proceedings, court begins "by repeating once more that a deportation hearing is a proceeding that is civil, not criminal, in nature"); *Lavoie*, 418 F.2d at 734 (since "deportation proceedings are civil and not criminal, in nature," Sixth Amendment safeguards "requiring the presence of counsel during interrogation" are not applicable).

¹⁵ See e.g., *Roach v. N.T.S.B.*, 804 F.2d 1147, 1152-55 (10th Cir. 1986) (no Fifth Amendment privilege not to testify in civil administrative investigation), *cert. denied*, 486 U.S. 1006, 108 S. Ct. 1732, 100 L.Ed.2d 195 (1988); *Williams v. U.S. Dept. of Transportation*, 781 F.2d 1573, 1578 n. 6 (11th Cir. 1986) (*Miranda* warnings not required in non-custodial setting of administrative investigation; no Sixth Amendment right to counsel during interrogation in non-criminal setting); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362-66, 104 S. Ct. 1099, 1104-05, 79 L.Ed.2d 361 (1984) (protection against Double Jeopardy does not apply in civil forfeiture proceedings); *Wolfolk v. Riviera*, 729 F.2d 1114, 1119-20 (7th Cir. 1984) (no right to counsel in civil cases); see also *United States v. 5,644,540 in United States Currency*, 799 F.2d 1357,

In other cases, the courts dismissed the constitutional challenge because deportation has never been held to constitute punishment.¹⁶ See *Bugajewitz v. Adams*, 228 U.S. 585, 591, 33 S. Ct. 607, 608, 57 L.Ed. 978 (1913) (deportation is not "a punishment; it is simply a refusal by the Government to harbor persons whom it does not want"). Again, citizens do not enjoy these rights in a non-punitive setting.¹⁷

In the final group of decisions, although the courts did not reach their conclusions based upon the civil, non-punitive nature of a deportation proceeding, they nevertheless employed the same analysis that would apply were a citizen making a similar constitutional challenge. For instance, in holding that an illegal arrest has no bearing on a subsequent deportation proceeding, the *Lopez-Mendoza* Court noted that

1364 n. 8 (9th Cir. 1986) (prohibition against ex post facto laws does not apply in civil forfeiture proceeding).

¹⁶ *Chabolla-Delgado*, 384 F.2d at 360 ("Deportation is not punishment within the meaning of the Eighth Amendment"); *Galvan*, 347 U.S. at 531, 74 S. Ct. at 743 (Ex Post Facto Clause does not apply to deportation proceedings); *Harisiades*, 342 U.S. at 594-95, 72 S. Ct. at 521-22 (Ex Post Facto Clause does not apply to deportation because "deportation, while it may be burdensome and severe for the alien, is not a punishment").

¹⁷ See e.g., *Ingraham v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 51 L.Ed.2d 711 (1977) (Eighth Amendment only applies to criminal punishment, not corporal punishment by school authorities); *Palermo v. Rorex*, 806 F.2d 1266, 1271 (8th Cir. 1987) (Eighth Amendment Cruel and Unusual Punishment Clause applies only in criminal actions following conviction), *cert. denied*, 484 U.S. 819, 108 S. Ct. 77, 98 L.Ed.2d 40 (1988); *Pace v. United States*, 585 F.Supp. 399, 402 (S.D. Tex. 1984) (denial of Social Security benefits does not violate Cruel and Unusual Punishment Clause because denial does not constitute punishment).

"[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred." 468 U.S. at 1039, 1040, 104 S. Ct. at 3483, 3484 (emphasis supplied). See also *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1141 (9th Cir. 1981) (same); *Medina-Sandoval v. INS*, 524 F.2d 658, 659 (9th Cir. 1975) (same). Similarly, in determining that the Fourth Amendment based exclusionary rule does not apply to deportation proceedings, the *Lopez-Mendoza* Court employed the cost-benefit balancing test set forth in *United States v. Janis*, 428 U.S. 433, 96 S. Ct. 3021, 49 L.Ed.2d 1046 (1976), a case involving a Fourth Amendment challenge outside the immigration area. Additionally, in holding that the Eighth Amendment bail clause did not prevent the denial of bail to an alien, the Supreme Court in *Carlson v. Landon*, 342 U.S. at 545, 72 S. Ct. at 537, noted that "[t]he Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country." See also *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (upholding provisions of Bail Reform Act of 1984 allowing for the denial of bail in certain circumstances).

In *Harisiades*, the Supreme Court applied to aliens the same First Amendment test then applicable to citizens. The decisions cited by the Government and discussed above follow the *Harisiades* approach. Rather than supporting a "different" Bill of Rights for aliens in the deportation setting, these cases merely employed the same methods of constitutional adjudication available to citizens and concluded that

the particular rights at issue had no application in the deportation area.

6. No Lower First Amendment Standard for Aliens in the Deportation Setting

Notwithstanding *Harisiades*, the Government urges us to adopt a lower First Amendment standard for aliens in the deportation arena. In support of this argument, the Government cites several decisions in which the Supreme Court has applied lower First Amendment scrutiny in limited contexts. For example, a prisoner retains only those First Amendment rights that are not "inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804, 41 L.Ed.2d 495 (1974). Similarly, while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L.Ed.2d 731 (1969), "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior." *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 106 S. Ct. 3159, 3164, 92 L.Ed.2d 549 (1986). The Supreme Court has also recognized that "[f]or the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker v.*

Levy, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562, 41 L.Ed. 2d 439 (1974).

The Government argues from these decisions that "if school children and military personnel [and prisoners] may be restricted in the exercise of their First Amendment rights, it is hardly surprising that Congress can specify a ground for deportation which touches First Amendment concerns." Gov't Supp. Memo. of May 19, 1987, at 41. We disagree. In each of the above areas—prisons, schools, and the military—the Supreme Court adopted a lower First Amendment standard because of the significant governmental interest asserted. This lower standard of review applies, however, only when a plaintiff is present in the settings at issue. Thus, the prison standard applies only to inmates under prison authority; the school standard applies only while children are in school; and the military standard applies only to servicemen during their time in the military.

In none of these decisions does the lesser degree of First Amendment protection have any effect on the individual's constitutional rights *outside* the limited environment. The warden cannot prevent a prisoner from having an interview with the media once she has served her time; the school principal cannot punish students for using profanity during their summer vacations; and the military cannot court martial a doctor for speaking out against U.S. foreign policy once his military commitment is over.

By contrast, it is impossible to adopt for aliens a lower degree of First Amendment protection solely in the deportation setting without seriously affecting their First Amendment rights outside that setting. Under a lower First Amendment standard, and with-

out the constitutional protection against ex post facto laws, the Government could conceivably pass a law allowing for the deportation of aliens for statements made several decades earlier. An alien would have no way of knowing whether his or her speech would someday become a ground for deportation and consequently would be chilled from speaking at all.

Simply stated, the Government's view is that aliens are free to say whatever they wish but the Government maintains the ability to deport them for the content of their speech. To state the proposition is to reject it. As Justice Murphy wrote over forty years ago:

Any other conclusion would make our constitutional safeguards transitory and discriminatory in nature. Thus the Government would be precluded from enjoining or imprisoning an alien for exercising his freedom of speech. But the Government at the same time would be free, from a constitutional standpoint, to deport him for exercising that very same freedom. The alien would be fully clothed with his constitutional rights when defending himself in a court of law, but he would be stripped of those rights when deportation officials encircle him.

Bridges v. Wixon, 326 U.S. at 162, 65 S. Ct. at 1456 (Murphy, J., concurring). Like Justice Murphy, we cannot agree that "the Constitution meant to make such an empty mockery of human freedom." *Id.* Since aliens enjoy full First Amendment protection outside

the deportation setting, we decline to adopt a lesser First Amendment test for use within that setting.¹⁸

B. *Plaintiffs' First Amendment Challenge to the McCarran-Walter Provisions*

Plaintiffs challenge the McCarran-Walter provisions as being substantially overbroad in violation of the First Amendment. Having concluded that aliens have the same First Amendment rights as citizens, and that these rights are not limited in the deportation context, we now address that challenge.

The Supreme Court recently considered the overbreadth doctrine in *City of Houston v. Hill*, 482 U.S. 451, 107 S. Ct. 2502, 2508, 96 L. Ed. 2d 398 (1987):

The elements of First Amendment overbreadth analysis are familiar. Only a statute that is

¹⁸ We do not dispute the Government's interests in preserving national security and promoting foreign policy in the exercise of its immigration power. These interests are adequately protected, however, by the prevailing First Amendment standard allowing for the deportation of individuals who advocate imminent lawless action and whose speech is likely to induce such action. See *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L. Ed. 2d 430 (1969). The Government could also deport aliens, without violating the First Amendment, for their affiliation with an organization, if it established that that group affiliation posed a legitimate threat to the government. See *Healy v. James*, 408 U.S. 169, 186, 92 S. Ct. 2338, 2348, 33 L. Ed. 2d 266 (1972); *United States v. Robel*, 389 U.S. 258, 265-66, 88 S. Ct. 419, 424-25, 19 L. Ed. 2d 508 (1967). In addition, as long as the Government narrowly tailors its deportation laws to further its compelling interests in foreign policy and national security, it can enact laws, (e.g., espionage or national secrecy laws), that allow for the deportation of aliens on the basis of their First Amendment activities. Thus, there is no basis for a lower standard of First Amendment protection for aliens.

substantially overbroad may be invalidated on its face. *New York v. Ferber*, 458 U.S. 747, 769 [102 S. Ct. 3348, 3361, 73 L. Ed. 2d 1113] (1982); *Broadrick v. Oklahoma*, [413 U.S. 601, 615, 93 S. Ct. 2908, 2917, 37 L. Ed. 2d 830 (1973)]. "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . ." *id.* at 630 [93 S. Ct. at 2925] (BRENNAN, J., dissenting). Instead, "[i]n a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 [102 S. Ct. 1186, 1191, 71 L. Ed. 2d 362] (1982); *Kolender v. Lawson*, 461 U.S. 352, 359 n. 8 [103 S. Ct. 1855, 360 n. 8, 75 L. Ed. 2d 903] (1983).

The rationale for the doctrine was stated in *NAACP v. Button*, 371 U.S. at 433, 83 S. Ct. at 338 (citations omitted): "[First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

Under *Hill*, we examine whether the McCarran-Walter provisions reach a "substantial amount of constitutionally protected conduct," by failing to make a distinction between lawful behavior and the more narrow scope of impermissible conduct not protected by the Constitution. In *Yates v. United*

States, 354 U.S. 298, 77 S. Ct. 1064, 1 L.Ed.2d 1356 (1957), the Supreme Court considered what type of limits the government could place on First Amendment activities. Interpreting the Smith Act of 1940, the Court held that to be constitutional, the statute could only apply to "advocacy of action for the overthrow of government by force and violence." *Yates*, 354 U.S. at 324, 77 S. Ct. at 1079-80 (emphasis supplied). The Court distinguished advocacy of action from advocacy of belief, stating that "[t]he essential distinction is that those to whom the advocacy is addressed must be urged to *do* something, now and not in the future, rather than merely *believe* in something." *Id.* at 324-25, 77 S. Ct. 1079-80 (emphasis in original).

Over a decade later in *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L.Ed.2d 430 (1969), the Supreme Court articulated the standard governing what constitutes permissible and impermissible conduct in the area of speech advocating unlawful action. Consistent with the First Amendment, the government may only prohibit advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Id.* at 447, 89 S. Ct. at 1829. The Court has repeatedly emphasized that the incitement must be to imminent lawless action. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 108, 94 S. Ct. 326, 328, 38 L.Ed.2d 303 (1973) (conviction for disorderly conduct during campus protest reversed where statements "amounted to nothing more than advocacy of illegal action at some future time").

Like the Supreme Court in *Harisiades*, we review the deportation statute employing the prevailing First Amendment standard. Under this standard, the

Brandenburg test, the McCarran-Walter provisions are substantially overbroad. Section 241(a)(6)(G)(v) ("Section (G)(v)") allows for the deportation of aliens who write, publish, or knowingly circulate, distribute, print, display, or possess any material advocating or teaching opposition to all organized government, the economic, international, and governmental doctrines of world communism, or the establishment in the United States of a totalitarian dictatorship. Section 241(a)(6)(H) ("Section (H)") allows for the deportation of aliens who are members of or affiliated with any organization that engages in the proscribed activities in Section (G). These provisions proscribe almost exclusively activity protected by the First Amendment. Simply writing, publishing circulating, distributing, printing, displaying, and possessing material advocating or teaching the prohibited ideologies cannot be equated with advocacy of imminent unlawful action. As stated in *Noto v. United States*, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 1520-21, 6 L.Ed.2d 836 (1961), "the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."

The other McCarran-Walter provisions are even more substantially overbroad than Sections (G)(v) and (H). Section 241(a)(6)(D) ("Section (D)") allows for the deportation of aliens who "advocate the economic, international, and governmental doctrines of world communism or the establishment in the United States of a totalitarian dictatorship, or who are members of or affiliated with any organization" that so advocates, "either through its own utterances or

through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization. . . .” Section (F)(iii) allows the deportation of “[a]liens who advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . the unlawful damage, injury or destruction of property.”

While Sections (G)(v) and (H) deal with advocacy and affiliation through the printed medium, Sections (D) and (F)(iii) proscribe advocacy and affiliation more generally. Like Sections (G)(v) and (H), though, Sections (D) and (F)(iii) do not differentiate between constitutionally permissible and impermissible activities. These provisions could as easily be applied to prohibit an alien from wearing a PFLP button, attending a PFLP lecture, distributing a PFLP newspaper, or teaching a PFLP viewpoint as they could be employed to prevent advocacy of imminent lawless action.

It takes no searching inquiry to conclude that, judged according to the prevailing *Brandenburg* test, the challenged provisions cannot pass constitutional muster. Accordingly, we hold that the McCarran-Walter provisions are substantially overbroad and violate the First Amendment.¹⁹

¹⁹ Plaintiffs have also asked this Court to address the constitutionality of Sections 901(a) and 901(b) of the FRAA. The former is challenged by immigrant aliens who claim that the denial of Section 901(a) protection to them violates the equal protection component of the Fifth Amendment Due Process Clause. The latter, specifically the PLO Exception, is challenged by nonimmigrant aliens also on Fifth Amendment grounds. Although we did address this latter challenge in our

CONCLUSION

In sum, we hold that aliens who are legally within the United States . . . the United States are protected by the First Amendment and that their First Amendment rights are not limited by the Government's plenary immigration power. Applying established First Amendment principles, we further hold that the McCarran-Walter provisions are substantially overbroad in contravention of the First Amendment.

ruling in court on December 22, 1988, at that time we did not reach the question of whether nonimmigrant aliens were entitled to First Amendment protection. Since we now find that the First Amendment protects all aliens, it is no longer necessary to consider the constitutionality of Section 901 of the FRAA.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 96-55929, 97-55479

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL., PLAINTIFFS

AND

AIAD BARAKAT; NAIM SHARIF; KHADER MUSA HAMIDE;
NUANGUGI JULIE MUNGAI; AYM MUSTAFA OBEID;
AMJAD OBEID; MICHEL IBRAHIM SHEHADEH; BASHAR
AMER, PLAINTIFFS-APPELLEES

v.

JANET RENO, ATTORNEY GENERAL; HAROLD EZELL;
C.M. MCCULLOUGH; DORIS MEISSNER, COMMISSIONER,
INS; ERNEST E. GUSTAFSON, PERSONALLY AND IN HIS
CAPACITY AS PAST DISTRICT DIRECTOR OF THE
IMMIGRATION AND NATURALIZATION SERVICE; RICHARD
K. ROGERS, DISTRICT DIRECTOR, PERSONALLY AND IN
HIS CAPACITY AS DISTRICT DIRECTOR OF THE
IMMIGRATION AND NATURALIZATION SERVICE; GILBERT
REEVES, PERSONALLY AND IN HIS CAPACITY AS AN
OFFICER OF THE IMMIGRATION AND NATURALIZATION
SERVICE; IMMIGRATION AND NATURALIZATION SERVICE,
DEFENDANTS-APPELLANTS

[Filed Dec. 23, 1997]

Before: D.W. NELSON and CANBY, Circuit
Judges, and TANNER,* District Judge.

ORDER

The members of the panel that decided this case voted unanimously to deny the petition for rehearing and all recommended rejection of the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

O'SCANNLAIN, Circuit Judge, with whom KOZINSKI and KLEINFELD, Circuit Judges, join, dissenting from denial of rehearing en banc:

Congress unambiguously revoked judicial review of deportation proceedings—with but one exception—when it passed, and the President signed into law, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996). Today, the Ninth Circuit nullifies the express intent of the elected branches of our government by carving out yet another exception, one which is neither contemplated nor permitted by the plain language of the statute. In so doing, we are in tension with the two other circuits which have

* The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

addressed IIRIRA's jurisdiction-stripping provisions, see *Auguste v. Attorney General*, 118 F.3d 723 (11th Cir. 1997); *Ramallo v. Reno*, 114 F.3d 1210 (D.C. Cir.1997), as well as a prior decision of this court itself, *Duldulao v. INS*, 90 F.3d 396 (9th Cir. 1996). Because I fear today's action inflicts mischief on the sound administration of our nation's immigration laws in the nine western states, I respectfully dissent from the court's decision not to review this case en banc.

I

In IIRIRA, Congress stated:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

8 U.S.C. § 1252(g) (emphasis added). As the opening clause suggests, Congress's elimination of jurisdiction over removal cases is not absolute. Another portion of section 1252, with unmistakable clarity, limits the number of exceptions to but one:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this chapter shall be available only in judicial review of a final order under this section.

8 U.S.C. § 1252(b)(9) (emphasis added).

At the risk of belaboring the obvious, when Congress says "only," it usually means "only." The only permitted judicial review of removal proceedings is the review of final orders. Under the plain language of IIRIRA, decisions by the Attorney General to commence proceedings and to adjudicate cases are simply not reviewable until the final order stage.

Nevertheless, this court now "finds" a second exception,¹ because "[a]ny other reading would present serious constitutional problems." *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997). Our circuit apparently believes that the narrowing of judicial review of deportation proceedings may violate the Constitution. To avoid these perceived problems, the court called upon "the well-established principle that where possible,

¹ The opinion locates this exception in § 1252(f)(1), which reads:

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

8 U.S.C. § 1252(f)(1). Contrary to the panel's interpretation, subsection (f) is not a grant of jurisdiction of any kind, but rather an additional restriction on jurisdiction that applies unless proceedings have been brought against an individual alien under part IV of this subchapter. Appropriately, subsection (f) is entitled "Limit on injunctive relief." The exception within this subsection is clearly only an exception to this subsection.

jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims." *Id.* at 1372 (emphasis added).

With respect, the opinion's reliance on this principle of constitutional avoidance—interpreting statutes to avoid perceived constitutional infirmities—is without foundation in the facts of this case. As the opinion itself admits, the principle is to be invoked only "where possible." Whatever the merits of constitutional avoidance might be, no court may "avoid" a perceived conflict when the text is unambiguous, as it is here. The avoidance canon, invoked with such abandon, amounts to nothing less than rewriting the statute.²

Moreover, judicial decisions based on constitutional avoidance are all the more suspect, quite frankly, when there is no constitutional infirmity to avoid. That is precisely the scenario in this case. As the Supreme Court has stated:

Deportation is not a criminal proceeding and has never been held to be punishment. No jury sits. No judicial review is guaranteed by the Constitution.

Carlson v. Landon, 342 U.S. 524, 533, 72 S. Ct. 525, 96 L. Ed. 547 (1951) (emphasis added). Just four years ago, the Supreme Court reminded us that, "[f]or reasons long recognized as valid, the responsibility for

² To be sure, it is the duty of the courts, when they have jurisdiction, to declare unconstitutional any law that violates a protected right. Even then, the power to strike down a statute as unconstitutional does not include the power to amend it. See Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 74, 97-98.

regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government. [O]ver no conceivable subject is the legislative power of Congress more complete." *Reno v. Flores*, 507 U.S. 292, 305, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976); *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977)) (internal quotation marks omitted) (citations omitted) (alteration in original). Heeding these very words, this court has previously declared that "aliens have no constitutional right to judicial review of deportation orders." *Duldulao v. INS*, 90 F.3d 396, 400 (9th Cir. 1996).

But alas, today's decision now creates an exception to this long-established rule. According to the opinion, the distinguishing factor in this case is that the plaintiffs have raised a First Amendment claim of selective enforcement. What the opinion overlooks, however, is that such exception swallows the constitutional principle. To fit within the exception, a potential deportee need only assert a First Amendment violation. Even if the claim were frivolous, no court can so rule until after obtaining jurisdiction. Because the question of jurisdiction logically precedes the question of merit, today's decision, which purports to expand jurisdiction only to meritorious First Amendment claims, actually broadens jurisdiction to all such claims, frivolous and meritorious alike. By artful pleading, a potential deportee now is entitled to judicial review notwithstanding the statute and the cases holding that there exists no constitutional right to judicial review in deportation matters. Noth-

ing could be more contrary to both Supreme Court precedent and this court's decision in *Duldulao*.³

II

By finding a constitutional infirmity where none exists and then engrafting onto the statute an exception of our own creation, we undermine the unambiguous intent of Congress.

I respectfully dissent.

³ Not surprisingly, the only other circuits to have dealt with the issue have upheld IIRIRA's limitations on federal court jurisdiction. See *Auguste*, 118 F.3d at 726-27; *Ramallo*, 114 F.3d at 1214.

APPENDIX K

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Section 1252 of Title 8, United States Code (Supp. II 1996), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 306(a), 110 Stat. 3009-607 to 3009-612, provides in pertinent part:

[(b)](9) Consolidation of questions for judicial review.

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section.

* * * * *

(f) Limit on injunctive relief.—

(1) In general.

Regardless of the nature of the action or claim or of the identity of the party or parties bringing

the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [8 U.S.C. 1221-1231], as amended by the [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.

* * * * *

(g) Exclusive jurisdiction.

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

3. Section 306(c)(1) of IIRIRA, 110 Stat. 3009-612, as amended by the Act of October 11, 1996, Pub. L. No. 104-302, 110 Stat. 3656 (technical corrections), provides:

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that [8 U.S.C. 1252(g)] (as added by subsection (a)) shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

4. Section 309(c)(1) of IIRIRA, 110 Stat. 3009-625, provides:

(c) TRANSITION FOR ALIENS IN PROCEDURES.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(A)
No. 97-1252

FILED

APR 30 1998

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ATTORNEY GENERAL, *et al.*,

Petitioners,

—v.—

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Paul L. Hoffman
ACLU Foundation of Southern
California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

David D. Cole
(*Counsel of Record*)
Center for Constitutional Rights
Georgetown University Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

Marc Van Der Hout
National Lawyers Guild
180 Sutter Street, 5th floor
San Francisco, California 94104
(415) 981-3000

Weston A. Edwards
John Walker
Sonnenschein Nath & Rosenthal
601 S. Figueroa Street, Suite 1500
Los Angeles, California 90017
(213) 892-5020

40 p

QUESTIONS PRESENTED

Petitioners have publicly admitted that they targeted respondents for deportation because of their political associations, that none of the respondents have engaged in any criminal activity, and that there would have been no basis for arresting respondents had they been United States citizens. In addition, petitioners have not challenged the district court's factual findings that the government selectively targeted respondents for their political associations despite having no evidence that respondents specifically intended to further any unlawful acts. Based on these findings, the district court preliminarily enjoined the Immigration and Naturalization Service from pursuing respondents' deportation pending final resolution of their First Amendment selective enforcement claims. The questions presented are:

1. Whether the district court had jurisdiction over respondents' selective enforcement claims, where to deny jurisdiction would deprive respondents of any judicial forum to redress immediate irreparable injury to their First Amendment rights, and where factual development necessary to prove their First Amendment claims is unavailable in the administrative immigration process or appellate court review thereof.

2. Whether the district court acted within its discretion in issuing a preliminary injunction, based on unchallenged factual findings that: (1) the group with which respondents are allegedly associated engages in a wide range of lawful activities; (2) petitioners targeted respondents for deportation based on their political associations without evidence that respondents specifically intended to further any unlawful ends of the group; and (3) petitioners did not seek to deport other similarly situated individuals.

RULE 29.6 STATEMENT

This brief is filed on behalf of eight individuals -- Aiad Barakat, Naim Sharif, Khader Musa Hamide, Nuangugi Julie Mungai, Ayman Mustafa Obeid, Amjad Obeid, Michel Ibrahim Shehadeh, and Basher Amer -- and the American-Arab Anti-Discrimination Committee (ADC). The ADC does not have any parent or subsidiary companies.

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
A. Statement of the Facts	1
1. The PFLP's Lawful Activities	1
2. Improper Motive	2
3. Disparate Impact	5
B. The Decisions Below	6
REASONS FOR DENYING THE WRIT	9
I. THE COURT OF APPEALS' JURISDICTIONAL HOLDING IS <i>SUI GENERIS</i> , ADDRESSES A "TRANSITIONAL" STATUTORY SCHEME UNLIKELY TO AFFECT OTHER CASES, AND IS ENTIRELY CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL	11
II. THE UNCHALLENGED FACTS OF THIS CASE DO NOT PRESENT THE CONSTITUTIONAL QUESTION REGARDING FUNDRAISING THAT DEFENDANTS RAISE IN THEIR PETITION FOR <i>CERTIORARI</i>	19

	<i>Page</i>
III. THE COURT OF APPEALS' DECISION REQUIRING A SHOWING OF SPECIFIC INTENT TO FURTHER ILLEGAL AC- TIVITIES CONFLICTS WITH NO OTHER COURT OF APPEALS, AND IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS	22
CONCLUSION	28

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Abedi-Tajrishi v. INS</i> , 752 F.2d 441 (9th Cir. 1985)	13
<i>American Construction Co. v.</i> <i>Jacksonville, T & K.W.R. Co.</i> , 148 U.S. 372 (1893)	21
<i>Aptheker v. Secretary of State</i> , 378 U.S. 500 (1964)	25
<i>Auguste v. Attorney General</i> , 118 F.3d 723 (11th Cir. 1997)	18
<i>Becerra-Jimenez v. INS</i> , 829 F.2d 996 (10th Cir. 1987)	17
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945)	25
<i>Cheng Fan Kwok v. INS</i> , 392 U.S. 206 (1968)	13
<i>Citizens Against Rent Control v. Berkeley</i> , 454 U.S. 290 (1981)	22
<i>Coriolan v. INS</i> , 559 F.2d 993 (5th Cir. 1977)	17
<i>Czerkies v. U.S. Dep't of Labor</i> , 73 F.3d 1435 (7th Cir. 1996)	15
<i>Dastmalchi v. INS</i> , 660 F.2d 880 (3d Cir. 1981)	13
<i>Dennis v. United States</i> , 341 U.S. 494 (1951)	26

	<i>Page</i>
<i>Dolores v. INS</i> , 772 F.2d 223 (6th Cir. 1985)	17
<i>Elfbrandt v. Russell</i> , 384 U.S. 11 (1966)	23, 24
<i>Fatehi v. INS</i> , 729 F.2d 1086 (6th Cir. 1983)	13
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	15
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 (1980)	16
<i>Gastellum-Quinones v. Kennedy</i> , 374 U.S. 469 (1963)	26
<i>Ghorbani v. INS</i> , 686 F.2d 784 (9th Cir. 1982)	13, 17
<i>Hamilton-Brown Shoe Co. v.</i> <i>Wolf Bros. & Co.</i> , 240 U.S. 251 (1916)	21
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952)	25, 26
<i>Healy v. James</i> , 408 U.S. 169 (1972)	7
<i>In re Asbestos Litigation</i> , 46 F.3d 1284 (3d Cir. 1994)	23
<i>In re Weitzman</i> , 426 F.2d 439 (8th Cir. 1970)	26
<i>INS v. Stanisic</i> , 395 U.S. 62 (1968)	13

	<i>Page</i>
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974)	15
<i>Kent v. Dulles</i> , 357 U.S. 116 (1958)	25
<i>Keyishian v. Board of Regents</i> , 385 U.S. 589 (1967)	23
<i>Kwong Hai Chew v. Colding</i> , 344 U.S. 590 (1953)	25
<i>Lennon v. INS</i> , 527 F.2d 187 (2d Cir. 1975)	13
<i>Makonnen v. INS</i> , 44 F.3d 1378 (8th Cir. 1995)	17
<i>Martinez de Mendoza v. INS</i> , 567 F.2d 1222 (3d Cir. 1977)	17
<i>Mount Healthy Bd. of Educ. v. Doyle</i> , 429 U.S. 274 (1977)	20
<i>NAACP v. Claiborne Hardware</i> , 458 U.S. 886 (1982)	24
<i>Noto v. United States</i> , 367 U.S. 290 (1961)	23
<i>Olaniyan v. District Director, INS</i> , 796 F.2d 373 (10th Cir. 1986)	13
<i>Osaghae v. INS</i> , 942 F.2d 1160 (7th Cir. 1991)	17
<i>Parcham v. INS</i> , 769 F.2d 1001 (4th Cir. 1985)	26
<i>R.A.V. v. City of St. Paul</i> , 505 U.S. 377 (1992)	24, 27

Page

<i>Rafeedie v. INS</i> , 795 F.Supp. 13 (D.D.C. 1992)	26
<i>Ramallo v. Reno</i> , 114 F.3d 1210 (D.C.Cir. 1997), petition for cert. filed (No. 97-526)	18
<i>Regan v. Wald</i> , 468 U.S. 222 (1984)	25
<i>Roberts v. United States Jaycees</i> , 468 U.S. 609 (1984)	23
<i>Rosenberger v. Rector and Visitors of the Univ. of Virginia</i> , 515 U.S. 819 (1995)	24
<i>Scales v. United States</i> , 367 U.S. 203 (1961)	23
<i>Staub v. City of Baxley</i> , 355 U.S. 313 (1958)	23
<i>Underwager v. Channel 9 Australia</i> , 69 F.3d 361 (9th Cir. 1995)	26
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	16
<i>United States v. Robel</i> , 389 U.S. 258 (1967)	23
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990)	25
<i>Village of Schaumburg v. Citizens for a Better Environment</i> , 444 U.S. 620 (1980)	23

Page

<i>Virginia Military Institute v. United States</i> , 508 U.S. 946 (1993)	21
<i>Webster v. Doe</i> , 486 U.S. 592 (1988)	15
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	15, 16

Statutes and Regulations

8 U.S.C. §1105a (1995)	12, 13, 14, 16
8 U.S.C. §1227(a)(2)(A)	3
8 U.S.C. §1227(a)(2)(D)	3
8 U.S.C. §1227(a)(4)(A)	3
8 U.S.C. §1252 (1996)	12
8 U.S.C. §1252(b)(4)(A)	16
8 U.S.C. §1252(f)	14, 15
8 U.S.C. §1252(g)	8, 12, 14, 15, 18
8 U.S.C. §1329 (1995)	15
18 U.S.C. §2	2
18 U.S.C. §32	2
18 U.S.C. §33	2
18 U.S.C. §371	2
18 U.S.C. §956	2
18 U.S.C. §1116	2

	<i>Page</i>
18 U.S.C. §1201	2
18 U.S.C. §1203	2
18 U.S.C. §1361	2
18 U.S.C. §2332	2
18 U.S.C. §2339B	21
28 U.S.C. §1331	15
28 U.S.C. §2347(c)	17
50 U.S.C. §781 (West 1991) (repealed 1993)	24
Hobbs Act, 28 U.S.C. §2347(b)	17
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L.No. 104-208, Div. C, 110 Stat. 3009	
§309(c)(1)(A), 8 U.S.C. §1101 note	12
§309(c)(1)(B), 8 U.S.C. §1101 note	12
§309(c)(2), 8 U.S.C. §1101 note	12
§309(c)(3), 8 U.S.C. §1101 note	12
§381, 8 U.S.C. §1329 note	15

STATEMENT OF THE CASE

A. Statement of the Facts

The government seeks review of a preliminary injunction barring the Immigration and Naturalization Service (INS) from pursuing plaintiffs' deportations until their First Amendment selective enforcement claims are resolved. The district court issued the injunction based on findings -- unchallenged on appeal -- that: (1) the group with which plaintiffs are accused of being associated, the Popular Front for the Liberation of Palestine (PFLP), engages in a wide range of lawful activities; (2) defendants singled plaintiffs out for associating with the PFLP without any evidence that plaintiffs specifically intended to further any unlawful ends; and (3) defendants did not seek to deport other similarly situated individuals.

1. The PFLP's Lawful Activities

The district court found, and the government has never disputed, that the PFLP, a constituent group within the Palestine Liberation Organization, engages in a wide range of lawful activities, including the provision of "education, day care, health care, and social security, as well as cultural activities, publications, and political organizing." Pet. App. 48a. It operates day care centers, hospitals, health clinics, schools, and youth clubs; awards scholarships for higher education; provides health insurance to its members and their families; sponsors art, music, and other cultural activities; publishes political magazines and newspapers; and maintains diplomatic offices in many countries throughout the world. C.A. SER 136-44.¹ The government's own evidence showed that the PFLP engages in widespread

¹ Citations to the Supplemental Excerpts of Record in the court of appeals will be designated "C.A. SER."

lawful political and cultural activities in the United States. Pet. App. 48a.

2. Improper Motive

The district court found, and defendants did not challenge on appeal, that defendants targeted plaintiffs for their political associations, and that "there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14. These findings are fully supported by the record:

1. The deportation cases began in January 1987, when the INS arrested all eight individual plaintiffs and charged them with being associated with a group that advocates the doctrines of world communism, a First Amendment-protected activity. Pet. App. 3a, 80a-82a.

2. Then-FBI Director William Webster testified in Congress two months after plaintiffs' arrests that "all of them were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation . . . [I]f these individuals had been United States citizens, there would not have been a basis for their arrest."²

² Pet. App. 4a. Had plaintiffs been supporting *illegal* conduct of the PFLP, they would have been subject to arrest (even as United States citizens) under the conspiracy or aiding and abetting statutes, 18 U.S.C. §§2, 371, and numerous statutes reaching terrorist acts abroad. See, e.g., 18 U.S.C. §32 (destruction of aircraft in foreign air commerce); §33 (destruction of motor-vehicle in foreign commerce); §956 (conspiracy to injure foreign property); §1116 (attacking internationally protected persons); §1201 (kidnapping of person in foreign commerce); §1203 (taking of hostages); §1361 (damage to American property); §2332 (killing Americans abroad). Support of illegal activities would also have warranted deportation under several provisions of the Immigration and (continued...)

3. INS District Director Ernest Gustafson, who authorized the deportation proceedings against plaintiffs, admitted that all eight "were singled out for deportation because of their alleged political affiliations with the [PFLP]." C.A. SER 306. He stated that the INS sought plaintiffs' deportation "at the behest of the FBI, which concluded after investigating plaintiffs that it had no basis for prosecuting plaintiffs criminally, and urged the INS to seek their deportation." *Id.* at 307.

4. When the INS dropped the initial political association charges against six of the eight plaintiffs, electing to proceed against them only for technical visa violations, INS Regional Counsel William Odencrantz announced that the change was merely tactical, and that the INS continued to seek deportation of all eight plaintiffs because "[i]t is our belief that they are members of [the PFLP]." C.A. SER 95-96; Pet. App. 82a.³

² (...continued)

Nationality Act (INA), none of which has ever been invoked here. See, e.g., 8 U.S.C. §§1227(a)(2)(A) (crimes of moral turpitude); (a)(2)(D) (conspiring to commit sabotage or sedition); (a)(4)(A) (any criminal activity that endangers public safety or national security).

³ On the eve of the first preliminary injunction hearing in this case, the INS dropped its political association charges against the six non-permanent-resident aliens -- Aiad Barakat, Naim Sharif, Julie Mungai, Ayman Obeid, Amjad Obeid, and Basher Amer -- and instead charged them with violating their visas, either by overstaying, by working without authorization, or by taking too few credits while on a student visa. It maintained political association charges against permanent residents Khader Hamide and Michel Shehadeh, but substituted a charge that they were associated with a group that advocates the destruction of property. The INS has since granted Barakat and Sharif legalization, and accordingly concedes they are no longer subject to deportation "based on the original visa violations." Pet. 7 n.4. The other four non-permanent-resident plaintiffs would be eligible for permanent resident status but for their alleged association with the PFLP.

5. Contemporaneous memoranda prepared by the FBI for the purpose of urging the INS to seek plaintiffs' deportation confirm that plaintiffs were singled out for lawful acts of political association. The documents, which include a 1300-page FBI report and memos on each of the plaintiffs, consist entirely of accounts of lawful and non-violent political activity. Over 300 pages of the FBI report, for example, are devoted to tracking plaintiffs' distribution of PFLP literature available in public libraries throughout the United States. The documents include detailed reports of political demonstrations, meetings, and dinners, and extensive quotations from political speeches, placards, and leaflets. They repeatedly criticize plaintiffs' political views as "anti-US, anti-Israel, anti-Jordan," C.A. SER 353, 369-70, 371, 372, 376, 377, 389, 392, and even "anti-REAGAN and anti-MABARAK [sic]." C.A. SER 364. The FBI report states that its purpose is "to identify key PFLP people in Southern California so that law enforcement agencies capable of *disrupting the PFLP's activities* through legal action can do so." C.A. SER 354 (emphasis added). It specifically urges plaintiff Hamide's deportation, not because he did anything criminal, but because he is "intelligent, aggressive, dedicated, and shows great leadership ability." C.A. SER 348.

6. While the government's petition misleadingly and repeatedly implies that plaintiffs' fundraising activities were the basis for the decision to deport, Pet. 3, 8, 12, 21, 22-30, the district court found that defendants in fact based their decision on a wide range of other speech and associational activities. The district court found and the government conceded that it targeted plaintiffs for their membership in the PFLP (Pet. App. 4a, 75a n.14, C.A. SER 306), distributing PFLP literature and recruiting new members (Pet. App. 132a), communicating with PFLP leaders in the United States, and attending PFLP meetings, in addition to humanitarian fundraising. (Pet. App. 60a-61a).

3. Disparate Impact

The district court and the court of appeals also found that the INS has not sought to deport numerous similarly situated aliens -- both permanent residents and aliens with technical visa violations -- who were members and supporters of the Nicaraguan Contras, Afghanistan Mujahedin, Mozambique RENAMO, several anti-Castro Cuban groups, and the Vietnamese Montagnards, organizations which engaged in similar INA-proscribed activities and advocacy. Pet. App. 18a-19a, 106a-07a, 138a-50a, 50a-51a n.3, 74a; C.A. SER 97-265, 286-90, 309-31. In fact, the INS has not sought to deport *any* aliens other than plaintiffs Hamide and Shehadeh solely for associational activities with *any* other group since this case began more than 11 years ago. C.A. SER 226. And an INS official testified that he could not remember *any* other instance in which the Los Angeles INS office sought to deport someone for taking too few academic credits on a student visa, the only charge against Bashar Amer, even though the INS received reports of many such violations. Pet. App. 88a. The district court's factual findings of disparate treatment were not challenged by the government on appeal.⁴

⁴ In light of defendants' failure to challenge the district court's findings, the Court should not be misled by defendants' Statement, which makes assertions that have no support in or are directly contradicted by lower court findings. For example, defendants begin their petition with a litany of charges regarding the PFLP's terrorist acts. Pet. 2. But no factual findings support any of these assertions. And more importantly, the district court found (and defendants do not dispute) that plaintiffs were not "in any way implicated" in any unlawful PFLP activities. Pet. App. 48a. In short, defendants' opening, like their theory of the case, is predicated on nothing more than guilt by association.

Similarly, defendants assert that an FBI agent observing a fundraising event concluded that money was apparently being raised for the PFLP's

(continued...)

B. The Decisions Below

On the basis of the evidence summarized above, the district court preliminarily enjoined the deportation proceedings against plaintiffs on selective enforcement grounds, and the court of appeals unanimously affirmed. The injunctions were issued and reviewed in two stages. In January 1994, the district court granted a preliminary injunction to six of the eight plaintiffs. Pet. App. 138a. It declined to extend the injunction to plaintiffs Hamide and Shehadeh at that time because it erroneously believed that it lacked jurisdiction over their claims. Pet. App. 129a.

Defendants appealed from the first injunction, and plaintiffs Hamide and Shehadeh cross-appealed from the district court's jurisdictional decision. On November 8, 1995, the court of appeals unanimously affirmed the initial

⁴ (...continued)

terrorist activities. Pet. 3 n.2. But the district court found that the evidence concerning this event -- a widely advertised family style dinner open to the public and attended by more than 1,000 persons -- did not reasonably support an inference that any fundraising was for terrorist activities, and defendants did not challenge that finding. Pet. App. 61a, 63a, 75a n. 14. In fact, all evidence showed that the funds were donated to the United States Organization for Medical and Educational Needs (U.S. OMEN), an IRS-certified tax-exempt humanitarian aid organization. Pet. App. 63a. Defendants refer to a statement by one speaker at the event, Jaber El-Wanni, which an FBI agent now characterizes as a threat on the life of an individual in the West Bank. Pet. 3 n.2. The FBI did not even mention any such "threat" in its contemporaneous memos on the event, or in its memos to the INS to support plaintiffs' deportations. Nor did the FBI ever take any action against Mr. El-Wanni himself. And as the district court found, "[t]here is no evidence that plaintiffs directed Mr. El-Wanni to make that statement, conspired with him, nor even that they were aware that he would make it. The only theory left for holding plaintiffs responsible for Mr. El-Wanni's statement is guilt by association, a theory forbidden by the First Amendment." Pet. App. 69a.

preliminary injunction. It first ruled that the district court had jurisdiction over plaintiffs' selective enforcement claims for two reasons: (1) plaintiffs' claims required factual development beyond the scope of the administrative deportation proceedings, and therefore could only be addressed in an original district court proceeding; and (2) plaintiffs were suffering irreparable injury to their First Amendment rights, and therefore to delay review would be to deny plaintiffs any forum for redress of immediate and ongoing constitutional injury. Pet. App. 85a-95a. Because the court of appeals found that the same reasoning was applicable to Hamide and Shehadeh's claims, it reversed the district court's dismissal of their claims. Pet. App. 95a-97a.

On the merits, the court of appeals held that plaintiffs are entitled to First Amendment protection as persons living in the United States, and that the government could not target them based on PFLP associational activity unless it showed that their association was "knowing" and with "specific intent to further [the PFLP's] illegal aims." Pet. App. 108a (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)). The government sought no further review of this decision, which carefully considered and rejected each of the government's arguments that aliens should be accorded diminished First Amendment protection. Pet. App. 109a-116a.

On remand to the district court, the government submitted over 10,000 pages of evidence, and moved to vacate the existing preliminary injunction. Plaintiffs Hamide and Shehadeh moved to extend the injunction to their cases. The district court found that the government had cited no "changed circumstances" that would justify vacating the existing preliminary injunction, since all the evidence it submitted with its motion to vacate could have been submitted when the injunction was first adjudicated. Pet. App. 55a n.6. The district court nonetheless examined

all of the new evidence, and found that "there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14. Accordingly, the court denied the motion to vacate the existing injunction, and granted Hamide and Shehadeh's motion to extend the injunction to them.

Defendants appealed a second time. Having failed in their contention that aliens do not deserve the same First Amendment rights as citizens, defendants now maintained that neither citizens nor aliens have a First Amendment right to provide material support to a "foreign terrorist organization," even if the support is provided and used solely for lawful activities. In making this claim, defendants again did not challenge any of the district court's factual findings.

While this second appeal was pending, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub.L.No. 104-208, Div. C, 110 Stat. 3009. The government argued, in a new motion to vacate the injunction in the district court and in a supplemental brief to the court of appeals, that one subsection of the act, now codified at 8 U.S.C. §1252(g), divested the courts of jurisdiction to adjudicate plaintiffs' First Amendment claims. Both the district court and the court of appeals rejected that view, because it would have deprived plaintiffs of *any* federal forum to litigate substantial First Amendment claims. Both courts rejected defendants' suggestion that plaintiffs could raise their claims some years down the road on appellate review of a deportation order. Appellate review is limited by statute to the administrative record, a record that defendants conceded cannot develop the facts necessary to prove plaintiffs' First Amendment claims. And even if appellate review were available, it would come too late in the day to redress

immediate irreparable injury to plaintiffs' First Amendment rights. Accordingly, both courts construed IIRIRA to preserve district court jurisdiction for constitutional challenges, such as plaintiffs', which cannot adequately be addressed on appellate review of a final deportation order. Pet. App. 22a-43a; 6a-15a.

On the merits, the court of appeals agreed with the district court that defendants had failed to cite any "changed circumstances" that would justify vacating the initial preliminary injunction. Pet. App. 17a. In addition, the court affirmed the extension of the injunction to Hamide and Shehadeh, based on the unchallenged findings that defendants did not have a reasonable ground for believing that plaintiffs specifically intended to further any unlawful acts of the PFLP. Pet. App. 18a-21a. The court rejected defendants' argument regarding fundraising for "foreign terrorist organizations" on two grounds. First, because defendants concededly targeted plaintiffs for many speech and associational activities beyond fundraising, defendants' fundraising argument, even if accepted, would not warrant denial of the injunction. And second, the right to associate with a political group has always included the right to provide financial support, so long as that support is not given with specific intent to further illegal ends. Pet. App. 20a-21a.

The government suggested rehearing *en banc*, and the court of appeals denied the suggestion. Three judges dissented. Pet. App. 246a.

REASONS FOR DENYING THE WRIT

This Court should deny review for several reasons. No other court of appeals has addressed either of the two issues presented here, and thus there is no conflict among the circuits. The jurisdictional issue is governed by temporary

"transitional" rules, making it highly unlikely that the issue will often, if ever, recur. The question presented on the merits is premature, as the government seeks interlocutory review of a preliminary injunction when final judgment is likely to follow shortly on a complete record. And the merits question as to which the government seeks review -- whether the First Amendment protects material support for the lawful activities of a "foreign terrorist organizations" -- is not properly presented, because the government does not challenge the district court's findings that plaintiffs were targeted for a wide range of speech and associational activities other than material support.

1. The jurisdictional issue presented here is *sui generis*. This case spans two separate jurisdictional statutes, and is governed by "transitional" rules that will soon be obsolete. The court of appeals ruled that under these "transitional" rules, district courts have jurisdiction to adjudicate constitutional claims for which there is no other adequate means of review. No other court of appeals has addressed this issue under the transitional rules, and thus the government seeks *certiorari* in the absence of a circuit conflict, and in a case unlikely to have broad impact. The only appellate decision the government even contends is in conflict with the court of appeals' decision -- *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996) -- did not address the issue presented here, because it both predated the transitional rules and concerned a facial constitutional challenge for which appellate review was fully adequate. Moreover, the court of appeals' result is consistent with decisions of this Court and other courts of appeals construing the prior immigration statute, with the rule that First Amendment claims require prompt judicial resolution, and with the maxim that jurisdictional statutes must be interpreted to preserve review of constitutional claims.

2. On the merits, defendants seek premature review of a question not properly presented. They ask the Court to grant review from an interlocutory appeal to rule that the First Amendment imposes no bar on selective targeting of citizens or aliens for supporting the lawful activities of foreign political organizations deemed "terrorist." However, defendants conceded below and do not challenge here the district court's findings that plaintiffs were targeted for a wide range of protected speech and associational activity other than fundraising. Thus, even if the abstract legal proposition defendants advance were correct, the preliminary injunction would stand. The government has shown no extraordinary circumstances warranting this Court to depart from its normal course of denying review before final judgment.

I. THE COURT OF APPEALS' JURISDICTIONAL HOLDING IS *SUI GENERIS*, ADDRESSES A "TRANSITIONAL" STATUTORY SCHEME UNLIKELY TO AFFECT OTHER CASES, AND IS ENTIRELY CONSISTENT WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL

Applying the established rule that jurisdictional statutes should not be construed to bar judicial review of constitutional claims, the court of appeals held that the district court had jurisdiction to hear plaintiffs' First Amendment selective-enforcement claims because no other forum could meaningfully address those claims. The district court is the *only* place plaintiffs can vindicate their constitutional claims for two reasons: (1) plaintiffs' selective enforcement claims cannot be addressed in the generally exclusive review process for deportation cases, because the immigration judge and Board of Immigration Appeals cannot develop the facts necessary to adjudicate

those claims, and the court of appeals' review is expressly limited to the administrative record, Pet. App. 12a-14a; 87a-92a; and (2) plaintiffs are suffering ongoing irreparable injury to their First Amendment rights, so that delay in resolution of their claims is equivalent to denying review of those constitutional claims. Pet. App. 14a-15a, 92a-94a.

As a threshold matter, the jurisdictional question presented is inappropriate for *certiorari* because it is *sui generis*. Plaintiffs' case spans two different statutory jurisdictional schemes, 8 U.S.C. §1105a (1995) and 8 U.S.C. §1252 (1996), and is governed by temporary "transitional" rules that apply only to a small subset of immigration cases. In enacting IIRIRA, Congress rewrote the judicial review statute for immigration cases, but specifically provided that the amendments made by IIRIRA "shall not apply" to deportation proceedings instituted before April 1, 1997. IIRIRA, §309(c)(1)(A), 8 U.S.C. §1101 note. Instead, "[those] proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments," subject only to a set of transitional rules. IIRIRA, §309(c)(1)(B), 8 U.S.C. §1101 note. Defendants contend that a single provision of IIRIRA, 8 U.S.C. §1252(g), nonetheless applies independently to pending cases, but do not argue that the rest of IIRIRA applies. Plaintiffs dispute that point, in large part because, as the court of appeals found, §1252(g) makes no sense standing alone: literally construed, it would render virtually all immigration decisions in cases instituted prior to April 1, 1997 immune from any judicial review. Pet. App. 8a-9a.⁵

⁵ Plaintiffs maintain that §1252(g) should apply to pending cases only where the Attorney General takes action, also specified by the traditional rules, to trigger the entire new judicial review scheme for a pending case. IIRIRA, §§309(c)(2), (c)(3), 8 U.S.C. §1101 note. The Attorney General has taken no such action here. While the court of appeals

(continued...)

But even if defendants' view were accepted, plaintiffs' case is governed by a unique transitional hybrid of old and new statutes that will affect few if any other cases. In light of the *sui generis* nature of this case, it should come as no surprise that not only is there no conflict among the circuits, but no other court has even addressed the jurisdictional issue presented here.

Under both the pre- and post-IIRIRA statutory schemes, the court of appeals correctly found that the district court had jurisdiction to hear claims of irreparable First Amendment injury that could not adequately be addressed in any other forum. In so construing 8 U.S.C. §1105a before IIRIRA was enacted, the court of appeals simply followed *Cheng Fan Kwok v. INS*, 392 U.S. 206, 209-10 (1968), which held that district court jurisdiction was proper for claims that cannot adequately be addressed through the generally exclusive appellate review process. Every other circuit to address the matter has concurred.⁶

The same principles guided the lower courts' interpretation of jurisdiction after enactment of IIRIRA.

⁵ (...continued)

rejected this view, it provides an independent ground for affirmance, and another reason why this case is inappropriate for *certiorari*.

⁶ See, e.g., *INS v. Stanisic*, 395 U.S. 62, 68 n.6 (1968) (district court has jurisdiction to review actions of District Director beyond the scope of the deportation hearing); *Olaniyan v. District Director, INS*, 796 F.2d 373, 376-77 (10th Cir. 1986) ("If the issues do not meet the jurisdictional tests of [§1105a], we have no authority to review them under the auspices of that section, and exclusive jurisdiction for initial review lies in district court"); *Abedi-Tajrishi v. INS*, 752 F.2d 441, 443 (9th Cir. 1985) (same); *Fatehi v. INS*, 729 F.2d 1086, 1088 (6th Cir. 1983); *Dastmalchi v. INS*, 660 F.2d 880, 891 (3d Cir. 1981); *Ghorbani v. INS*, 686 F.2d 784, 791 (9th Cir. 1982) (same); *Lennon v. INS*, 527 F.2d 187, 195 (2d Cir. 1975) (district court has jurisdiction over selective enforcement claim).

Like 8 U.S.C. §1105a, the new IIRIRA judicial review scheme generally limits judicial review of deportation orders to a petition for review in the court of appeals, but preserves district court review for claims that cannot adequately be addressed through the otherwise exclusive review scheme. 8 U.S.C. §1252(g), the provision upon which defendants rely, states that "*except as provided in this section . . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings . . . against any alien under this Act.*" 8 U.S.C. §1252(g) (emphasis added). The opening clause italicized above expressly contemplates exceptions to its jurisdictional bar. Section 1252(f) is one such exception, and the court of appeals held that if §1252(g) applies here, so must §1252(f). Section 1252(f) in turn bars injunctive relief against the deportation provisions, "other than with respect to the application of such provisions to an individual alien against whom proceedings . . . have been initiated." 8 U.S.C. §1252(f). As the court of appeals found, this language authorizes injunctive actions in district court by individuals against whom deportation proceedings have been initiated, such as plaintiffs. Defendants offer no alternative explanation of the statutory language.

The court of appeals' result accords with the general goal of streamlining deportation appeals. An alien against whom proceedings have been initiated will ordinarily have no right to district court injunctive relief, because to the extent his legal claims can be addressed in the immigration process and appellate review thereof, he will have an adequate remedy at law. For the vast majority of cases, therefore, the immigration process and appellate review will be exclusive. But where an alien advances a claim that cannot be adjudicated in the immigration process or heard

on appellate review, injunctive relief is appropriate, and is authorized by 8 U.S.C. §1252(f).⁷

Preservation of district court jurisdiction for First Amendment claims that cannot otherwise be heard, such as plaintiffs' claims here, is also required by two other lines of Supreme Court precedent. Absent "clear and convincing evidence" that Congress intended otherwise, jurisdictional statutes must be construed to preserve review of constitutional claims.⁸ Allegations of irreparable First Amendment injury in particular require prompt judicial review.⁹ The only judicial review defendants suggest might

⁷ Where an otherwise exclusive jurisdictional provision does not apply, plaintiffs are entitled to fall back on general federal question jurisdiction, 28 U.S.C. §1331, and on 8 U.S.C. §1329 (1995), providing district court jurisdiction for actions arising under the INA. The government is likely to maintain that §1252(g) bars such reliance, but by its terms, that provision imposes no bar for the exceptions "provided in this section." Subsection (f) provides an exception to subsection (g), and permits injunctive actions, which may therefore go forward under either §1331 or §1329. IIRIRA amended 8 U.S.C. §1329 to limit it to actions filed by the government (rather than against the government), but that limitation applies only to cases filed after September 30, 1996. IIRIRA, §381, 8 U.S.C. §1329 note.

⁸ See, e.g., *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1439 (7th Cir. 1996) (*en banc*) (Posner, J.) ("The circuits are in agreement: door closing statutes do not, unless Congress expressly provides, close the door to constitutional claims"). The district court applied this rule to 8 U.S.C. §1252(g), and interpreted it not to apply to constitutional claims that could not otherwise be heard because it does not specify that it applies to such claims, and there is no "clear and convincing evidence" that Congress sought to foreclose review of such claims. Pet. App. 32a-36a; *Johnson v. Robinson*, 415 U.S. at 373-74.

⁹ See, e.g., *Younger v. Harris*, 401 U.S. 37, 48 (1971); *Freedman v.* (continued...)

be available is barred by the inability to develop the necessary facts, and in any event would come only after many years of administrative proceedings, during which time plaintiffs' ongoing First Amendment injuries would be unredressable.¹⁰

Defendants have conceded that plaintiffs cannot develop the facts for their selective enforcement claims in the immigration process. Pet. App. 12a, 40a, 87a. Such claims, therefore, cannot be adjudicated on appellate review, which is expressly limited to the administrative record.¹¹ The government nonetheless argues that a court of appeals on appellate review could remand plaintiffs' selective enforcement claims to a district court for factual

⁹ (...continued)

Maryland, 380 U.S. 51, 58 (1965). Because plaintiffs do not rely on "the expense and annoyance of litigation," but on the palpable chill on their First Amendment rights, defendants' reliance on *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), and *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982)(*per curiam*), Pet. 15 n.6, 19, is misplaced. Neither case involved a claim of irreparable injury to First Amendment rights. This Court has recognized the difference. *Younger v. Harris*, 401 U.S. at 48 (even though federalism generally bars federal court intervention into state criminal proceedings, such intervention justified where state prosecution invoked in retaliation for exercise of First Amendment rights).

¹⁰ Before their cases were enjoined in 1996, Hamide and Shehadeh's deportation proceeding before an immigration judge had already lasted several years, and was not even 25% completed. Administrative appeals to the Board of Immigration Appeals frequently take many years to be resolved.

¹¹ This is true for cases governed both by IIRIRA and by the prior jurisdictional statute. 8 U.S.C. §1252(b)(4)(A) provides: "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based." 8 U.S.C. §1105a(4) (1995) provided: "the petition shall be determined solely upon the administrative record upon which the deportation order is based."

development under the Hobbs Act, 28 U.S.C. §2347(b). Pet. 18. The court of appeals twice properly rejected this argument. Pet. App. 13a-14a; 90a-91a. As every court to address the issue has found, and as the INS has repeatedly argued elsewhere, a remand to district court to develop facts would contravene the express statutory directive that appellate review be limited to the administrative record.¹² The government has never explained its aberrant position here, nor has it explained how an appeal that must be decided "solely upon the administrative record" could be based on evidence developed outside the administrative record.¹³

¹² *Ghorbani v. INS*, 686 F.2d at 787 n.4 (accepting INS's argument that statutory provision limiting appellate review to the administrative record "precludes application of the procedures of the Hobbs Act that permit transfer of a case to a district court for a hearing"); *Osaghae v. INS*, 942 F.2d 1160, 1162 (7th Cir. 1991)(statutory provision limiting appellate review to the administrative record means that "we are not to take evidence and base our decision on some mixture of that evidence and the evidence that was before the Board"); *Makonnen v. INS*, 44 F.3d 1378, 1385 (8th Cir. 1995)(same); *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977)(same).

¹³ The government argues that authority for a remand to the district court under 28 U.S.C. §2347(b) can be implied from the fact that the IIRIRA judicial review scheme specifically prohibits a court of appeals from remanding to the agency for factual development pursuant to 28 U.S.C. §2347(c). Pet. 18. As the court of appeals found, this argument fails. Pet. App. 13a-14a. IIRIRA's statutory bar on remanding to the agency pursuant to §2347(c) was necessary because under the prior review scheme, several courts had held that such remands were permissible, over the INS's objections. See, e.g., *Makonnen*, 44 F.3d at 1385; *Osaghae*, 942 F.2d at 1162; *Becerra-Jimenez v. INS*, 829 F.2d 996, 1001 (10th Cir. 1987)("We adopt the position of the Sixth, Fifth, and Third Circuits and hold that §2347(c) is available to this court to require the INS, upon remand, to reopen deportation proceedings."); *Dolores v. INS*, 772 F.2d 223, 226 (6th Cir. 1985); *Martinez de Mendoza v. INS*, 567 F.2d 1222, 1226 (3d Cir. 1977); *Coriolan*, 559 (continued...)

The court of appeals' decision is not in conflict with any decision of this Court or any court of appeals. The *only* purported conflict the government identifies is with *Massieu v. Reno*, 91 F.3d 416, a case that predated IIRIRA. Pet. 14. There is no conflict, however, because *Massieu* addressed only the *facial* constitutionality of a particular deportation provision, a claim that could be adequately addressed on appellate review of a final deportation order because it needed no factual development. The Third Circuit repeatedly stated that the result would have been different if, as is the case here, meaningful review were not possible on appellate review. 91 F.3d at 422-24.¹³

Defendants correctly note that two other courts have dismissed cases on the basis of 8 U.S.C. §1252(g): *Ramallo v. Reno*, 114 F.3d 1210 (D.C.Cir. 1997), *petition for cert. filed* (No. 97-526), and *Auguste v. Attorney General*, 118 F.3d 723 (11th Cir. 1997). Significantly, however, defendants do not contend that these cases conflict with the court of appeals' decision. Neither case involved ongoing irreparable constitutional injury requiring immediate judicial review, and in both cases the courts of appeals found that alternative avenues of review were available and adequate to address plaintiffs' claims. *Auguste* could have filed a petition for review, but did not. 118 F.3d at 725. *Ramallo*

¹³ (...continued)

F.2d at 1004. By contrast, every court to address the issue of remand to the district court had accepted the INS's argument that the restriction of appellate review to the administrative record precluded such remands. Pet. App. 91a; *see supra* note 12. Accordingly, Congress and the INS had no need to add language to bar remands to district court, because they were already barred by the "administrative record" provision.

¹⁴ The government notes that the alien in *Massieu* also advanced a selective enforcement claim, Pet. 15, but neither the court of appeals nor the district court in *Massieu* even addressed that claim; both decisions in that case exclusively discussed *Massieu's* facial constitutional challenge.

could adjudicate her claims on a petition for habeas corpus. 114 F.3d at 1214. Here, an original action in district court is the *only* forum available to address plaintiffs' constitutional claims.

Thus, the lower courts' interpretation of IIRIRA to preserve review of plaintiffs' constitutional claims is consistent with the language of the statute, established jurisprudence regarding judicial review of immigration actions, the constitutional requirement of prompt review of First Amendment claims, and the mandate that jurisdictional statutes be read to preserve judicial review of constitutional claims.

II. THE UNCHALLENGED FACTS OF THIS CASE DO NOT PRESENT THE CONSTITUTIONAL QUESTION REGARDING FUNDRAISING THAT DEFENDANTS RAISE IN THEIR PETITION FOR *CERTIORARI*

The merits question raised in the government's petition is not properly presented. The government portrays the case as if it turns on whether there is a First Amendment right to provide material support for the lawful activities of foreign terrorist organizations. But as the court of appeals held, resolution of that question will not affect the underlying injunction, because the facts as found by the district court and admitted by defendants establish that defendants targeted plaintiffs for many First Amendment-protected activities other than fundraising, including membership, communication with other members, literature distribution, and attending meetings. Pet. App. 21a; 75a n.14.

In light of these concessions and findings, plaintiffs would be entitled to preliminary injunctive relief even assuming *arguendo* that fundraising for lawful activities were not constitutionally protected, *but see* Point III, *infra*,

because defendants have not met the heavy burden of showing that they would have targeted plaintiffs for their fundraising even in the absence of all the other First Amendment-protected activities for which plaintiffs were targeted. *Mount Healthy Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977). Of some 10,000 pages that defendants submitted in the district court, fewer than 50 pages concern plaintiffs' fundraising, while the vast majority report on speech and associational activities that defendants do not dispute are protected by the First Amendment. The evidence shows that defendants spent far more time and effort monitoring and reporting on plaintiffs' distribution of literature, political speeches, and demonstrations than they did attempting to determine the purposes of plaintiffs' fundraising, which in any event was directed to a domestic non-profit humanitarian aid organization, the United States Organization for Medical and Educational Needs. Pet. App. 63a.¹⁵

The government suggests that the court of appeals' decision might have negative implications for the

¹⁵ Defendants disingenuously suggest that the district court required the government to "follow the trail of money." Pet. 8-9. The court imposed no such requirement; it required only that defendants show that plaintiffs had "specific intent" to further the PFLP's unlawful acts, which does not require trailing the money. It is nonetheless revealing that defendants made no attempt to determine where the money raised actually went, in the face of clear evidence in their own documents that it went to a domestic tax-exempt humanitarian organization.

Amici suggest that if this is a mixed motive case, defendants should have had an opportunity to meet their burden under *Mt. Healthy*. *Amici Br. of Washington Legal Foundation, et al.*, at 13. But defendants had two opportunities to do so, as the district court held two hearings on the preliminary injunctions. Defendants chose not to try to meet the *Mt. Healthy* test, preferring to argue that their actions violated no constitutional rights whatsoever. They have already had two bites at the apple. They have no right to a third.

constitutionality of 18 U.S.C. §2339B, a 1996 statute criminalizing material support to foreign organizations designated "terrorist" by the Secretary of State. Pet. 23-25. But that statute, which only criminalizes support *after* an organization has been designated, has no applicability to the conduct at issue here, which took place more than a decade before §2339B became law. Indeed, the government has not yet prosecuted anyone under that statute. In effect, defendants ask the Court to take this case, on a factual record that does not even properly present the issue of material support, in order to render an advisory opinion on a statute not at issue.

The fact that only a preliminary injunction is involved argues further against granting *certiorari* now. The Court's normal practice is to deny review absent extraordinary circumstances. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993)(Scalia, J., concurring); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916)(lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application"; *American Construction Co. v. Jacksonville, T & K.W.R. Co.*, 148 U.S. 372, 384 (1893)(Court should not grant *certiorari* from interlocutory appeal "unless it is necessary to prevent extraordinary inconvenience and embarrassment"). No extraordinary circumstances have been shown here -- at issue is simply whether deportation actions against six individuals should be temporarily stayed pending resolution of substantial claims that they were targeted for exercising their First Amendment rights. The preliminary injunction affects no other aliens, and has no general consequences for any federal program.

Once discovery is complete, plaintiffs will seek a permanent injunction on a full record. Discovery has been delayed principally because of defendants' opposition to disclosure, opposition that has led to harsh criticism and

even sanctions from the district court. *See, e.g.*, Pet. App. 51a-56a (finding defendants' withholding of documents "extremely troubling"); Order Granting Plaintiffs' Motion To Amend Discovery Plan, To Compel Production Of Documents, And For Sanctions (Aug. 24, 1996)(assessing sanctions for withholding of documents). And the government has not identified any particular harms arising from the fact that the injunction permits plaintiffs to live here peaceably until their First Amendment claims are finally resolved. Where a final decision on a complete record is certain to follow, and no harm will come from delay, a grant of *certiorari* would be improvident.

III. THE COURT OF APPEALS' DECISION REQUIRING A SHOWING OF SPECIFIC INTENT TO FURTHER ILLEGAL ACTIVITIES CONFLICTS WITH NO OTHER COURT OF APPEALS, AND IS FULLY CONSISTENT WITH THIS COURT'S PRECEDENTS

Even if it were properly presented on this record, the issue of whether material support to a "foreign terrorist organization" is constitutionally protected would not warrant *certiorari* review. As with the jurisdictional issue, no other court of appeals has even addressed this issue, and thus there is no conflict among the circuits. And the court's decision fully accords with established First Amendment precedent.

First, this Court has repeatedly recognized that soliciting and donating funds is a form of constitutionally protected political association.¹⁶ Millions of American citizens and

¹⁶ *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295-96 (1981)(monetary contributions to a group are a form of "collective (continued...)

immigrants "associate" with the NRA, the ACLU, the Boy Scouts, or labor unions by paying dues, donating funds, or raising money.

Second, the Court has long held that association with a political group cannot be penalized absent a showing of specific intent to further the group's illegal ends.¹⁷ Any other standard is guilt by association. Defendants' argument that money is fungible and difficult to trace, Pet. 25 and n.12, would apply equally to donations made to Operation

¹⁶ (...continued)

expression" protected by the right of association); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984)(First Amendment protects Jaycees' "fundraising"); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632-33 (1980)(First Amendment protects non-profit group's solicitation of funds); *Staub v. City of Baxley*, 355 U.S. 313 (1958)(striking down on First Amendment grounds law requiring permit to solicit citizens for membership in any organization that requires fees or dues); *In re Asbestos Litigation*, 46 F.3d 1284, 1290 (3d Cir. 1994)(contributions to political organization are constitutionally protected absent specific intent to further the group's illegal ends).

¹⁷ *See United States v. Robel*, 389 U.S. 258, 262 (1967)(invalidating ban on Communist Party members working in defense facilities absent showing of "specific intent"); *Keyishian v. Board of Regents*, 385 U.S. 589, 606 (1967)("[m]ere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis" for barring employment in state university system to Communist Party members); *Elfbrandt v. Russell*, 384 U.S. 11, 19 (1966)(invalidating oath requiring state employees not to join Communist Party because "a law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms"); *Scales v. United States*, 367 U.S. 203, 221-22 (1961)(construing Smith Act, which barred membership in organization advocating violent overthrow of government, to require showing of "specific intent"); *Noto v. United States*, 367 U.S. 290, 299-300 (1961)(First Amendment bars punishment of "one in sympathy with the legitimate aims of [the Communist Party], but not specifically intending to accomplish them by resort to violence").

Rescue or the NAACP, but the fact that some members of a group may engage in criminal acts does not justify punishing those who have supported those groups *without* intending to further their illegal ends. *NAACP v. Claiborne Hardware*, 458 U.S. 886, 925 (1982).

Third, defendants' proposal that an exception be crafted for "foreign terrorist organizations" whose interests are at odds with those of the United States invites the Court to authorize viewpoint-based discrimination, which is presumptively unconstitutional. See *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-32 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Fourth, defendants' proposed exception cannot be squared with the fact that the "specific intent" standard was developed in response to government efforts to penalize association with the Communist Party. This Court acknowledged that the Communist Party was a foreign-dominated group dedicated to overthrow the United States government,¹⁸ but held that the *only* narrowly tailored way to further the government's interest in national security was to penalize only those who specifically intended to further its unlawful ends. "A law which applies without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms" and relies on "'guilt by association,' which has no place here." *Elfbrandt v. Russell*, 384 U.S. at 19 (internal citations omitted). If the specific intent standard was

¹⁸ Congress had made specific findings that the Communist Party was: (1) foreign-dominated; (2) engaged in terrorism and sabotage with intent forcibly to overthrow the United States government; and (3) posed a clear and present danger to our national security. 50 U.S.C. §781 (West 1991)(repealed 1993).

adequate to respond to the threat of the Communist Party, it is likewise sufficient for the PFLP.¹⁹

Finally, no different result is mandated by the fact that plaintiffs are permanent resident aliens.²⁰ The First Amendment does not "acknowledge[] any distinction between citizens and resident aliens." *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n.5 (1953)(quoting *Bridges v. Wixon*, 326 U.S. 135, 161 (1945)(Murphy, J., concurring)); see also *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990)("resident aliens have First Amendment rights"). In *Bridges v. Wixon*, 326 U.S. at 148, the Court reversed a deportation order based on association with the Communist Party, stating that "freedom of speech . . . is accorded aliens residing in this country." And, in *Harisiades v. Shaughnessy*, 342 U.S. 580, 592 (1952), the Court upheld

¹⁹ Defendants contend that because the government is permitted to place economic embargoes on transactions with or travel to foreign countries, it should also be permitted to target *political groups* for such treatment. But this Court has said precisely the opposite. In the very cases that uphold country-based limits, the Court has distinguished similar limits placed on the Communist Party, which it has declared unconstitutional. See e.g., *Regan v. Wald*, 468 U.S. 222, 241 (1984)(upholding restriction on travel to Cuba, and distinguishing *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Kent v. Dulles*, 357 U.S. 116 (1958), both of which invalidated restrictions on travel of Communist Party members). A law directed at trade with a foreign nation may have an *incidental* effect on First Amendment activities, as do many laws. But government action targeted at political association as such *directly* punishes the exercise of a First Amendment right.

²⁰ The government's petition presents only the question of lawful permanent resident aliens' rights, because the government does not challenge the lower courts' holdings that it failed to identify any "changed circumstances" justifying alteration of the pre-existing preliminary injunction against the other six aliens, who were not permanent residents.

the deportation of a Communist Party member only after finding that the government's evidence satisfied the then-prevailing standard for citizens, set forth in *Dennis v. United States*, 341 U.S. 494 (1951). In doing so, the Court declined to adopt the government's argument that the First Amendment "do[es] not apply to the political decision of Congress to expel a class of aliens whom it deems undesirable residents." *Harisiades*, 342 U.S. 580, 96 L.Ed. at 592-94 (quoting Brief for the United States at 95-96).²¹

The court of appeals did not hold, as the government suggests, that "the constitutional principles applicable to citizens must apply in their entirety to the determination of which aliens will be deported." Pet. 27. Unlike the government in its petition, the court of appeals carefully distinguished the First Amendment from other constitutional provisions. Pet. App. 115a-116a. To hold that permanent residents may be singled out on the basis of viewpoint for First Amendment activities fully protected for United States

²¹ As lower courts have recognized, "[i]t has long been settled that aliens within the United States enjoy the protection of the First Amendment." *Rafeedie v. INS*, 795 F.Supp. 13, 22 (D.D.C. 1992); *Underwager v. Channel 9 Australia*, 69 F.3d 361, 365 (9th Cir. 1995) ("the speech protections of the First Amendment at a minimum apply to all persons legally within our borders"); *Parcham v. INS*, 769 F.2d 1001, 1004 (4th Cir. 1985); *In re Weitzman*, 426 F.2d 439, 449 (8th Cir. 1970) (Blackmun, J.).

Defendants' reliance on *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963), Pet. 28, is misplaced. Because the Court in that case ruled that the INS failed to meet the statutory showing required to establish deportability for Communist Party membership, it had no occasion to address any constitutional claim. The Court has not addressed the constitutionality of deportation for political association since *Harisiades*, where it applied the same First Amendment standard that applied to citizens.

citizens would undermine the speech rights of us all, because the marketplace of ideas rests on communications with and among non-citizens and citizens alike. On the government's view, Peter Jennings, a Canadian citizen and permanent resident alien, would have less freedom to speak than Dan Rather. There is simply no support in logic or precedent for such a distinction.²²

The merits question is not properly presented on this record, but even if it were, there would be no basis for granting *certiorari* at this preliminary stage in the absence of any conflict among the circuits.

²² Even if permanent resident aliens were somehow entitled to diminished First Amendment protection, the actions the government seeks to defend here would be invalid, because they are classic examples of viewpoint discrimination. Plaintiffs were singled out because of their political association with an organization whose political objectives our government disapproves. Even a reduced level of First Amendment protection would prohibit viewpoint discrimination, since it is the paradigmatic First Amendment violation. *R.A.V.*, 505 U.S. at 391.

CONCLUSION

For all the foregoing reasons, the Court should deny the petition for *certiorari*.

Respectfully submitted,

David D. Cole
(*Counsel of Record*)
Center for Constitutional Rights
Georgetown University Law Center
600 New Jersey Avenue, N.W. -
Washington, D.C. 20001
(202) 662-9078

Marc Van Der Hout
National Lawyers Guild
180 Sutter Street, 5th floor
San Francisco, California 94104
(415) 981-3000

Steven R. Shapiro
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Paul L. Hoffman
ACLU Foundation of
Southern California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Weston A. Edwards
John Walker
Sonnenschein Nath & Rosenthal
601 S. Figueroa Street, Suite 1500
Los Angeles, California 90017
(213) 892-5020

Dated: April 30, 1998

16

Supreme Court, U. S.
FILED
MAY 13 1998
CLERK

No. 97-1252

In the Supreme Court of the United States

OCTOBER TERM, 1997

**JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS**

v.

**AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

13 PP

TABLE OF AUTHORITIES

Cases:	Page
<i>Cameron v. Johnson</i> , 390 U.S. 611 (1968)	7
<i>DKT Memorial Fund v. Agency for Int'l Dev.</i> , 887 F.2d 275 (D.C. Cir. 1989)	9
<i>FDIC v. Meyer</i> , 510 U.S. 471 (1994)	3
<i>FTC v. Standard Oil Co.</i> , 449 U.S. 232 (1980)	3
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	4
<i>Galven v. Press</i> , 347 U.S. 522 (1954)	10
<i>Gastelum-Quinones v. Kennedy</i> , 374 U.S. 469 (1963)	10
<i>Healy v. James</i> , 408 U.S. 169 (1972)	9
<i>Massieu v. Reno</i> , 91 F.3d 416 (3d Cir. 1996)	2
<i>Regan v. Wald</i> , 468 U.S. 222 (1984)	9
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	4
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30 (1992)	3
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994)	7
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	4
Constitution and statutes:	
U.S. Const. Amend. I	4, 5, 7, 8, 10
Administrative Procedure Act, 5 U.S.C. 701 <i>et seq.</i>	3
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a), 110 Stat. 1247	9
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009	1

II

Statutes—Continued:	Page
Immigration and Nationality Act, 8 U.S.C. 1101	
<i>et seq.</i> :	
8 U.S.C. 1252(b)(9) (Supp. II 1996)	2
8 U.S.C. 1252(f) (Supp. II 1996)	2, 3
8 U.S.C. 1252(g) (Supp. II 1996)	2
8 U.S.C. 1329 (1994)	3
18 U.S.C. 2339B (Supp. II 1996)	7, 8
28 U.S.C. 1331	3
28 U.S.C. 2347(b)(3)	3, 4
Miscellaneous:	
Exec. Order No. 12,947, 60 Fed. Reg. 5079 (1995) ..	7

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1252

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONERS

The most immediate result of respondents' lawsuit has been to delay, for more than a decade, the completion of an administrative process that Congress intended to be streamlined and expeditious. The deleterious effects of the court of appeals' rulings, however, are not confined to the protraction of the instant proceedings. The court's jurisdictional analysis will affect enforcement of the immigration laws more generally, flouting Congress's efforts in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009, to ensure against this sort of judicial interference in the deportation process. The court has also recognized an unprecedented constitutional right to provide material support to foreign terrorist organizations. Those rulings threaten substantial disruption of important law enforcement and national security interests.

I. A. In our certiorari petition, we explain (at 13-20) that both before and after passage of IIRIRA, the courts below lacked jurisdiction to adjudicate respondents' selective enforcement claims prior to the entry of a final order of

deportation. The Ninth Circuit's finding of jurisdiction conflicts with the Third Circuit's holding in *Massieu v. Reno*, 91 F.3d 416 (1996), that the jurisdictional limitations imposed by the Immigration and Nationality Act are fully applicable to constitutional claims, specifically including selective enforcement claims. See Pet. 14-15.

Respondents contend (Br. in Opp. 12) that the jurisdictional issue does not warrant this Court's review because it "is governed by temporary 'transitional' rules that apply only to a small subset of immigration cases." That is not an accurate characterization of the *AADC III* court's holding. Nothing in the court of appeals' opinion suggests that its resolution of the jurisdictional question turned on the fact that the deportation proceedings at issue here were instituted before IIRIRA's effective date. To the contrary, the court assumed that *all* of the arguably relevant IIRIRA provisions—8 U.S.C. 1252(b)(9), (f), and (g) (Supp. II 1996)—applied to the present case. See Pet. App. 12a. The Ninth Circuit's holding that respondents' selective enforcement claims could go forward therefore applies with full force to future deportation proceedings.¹

B. As the petition explains (at 15-16), 8 U.S.C. 1252(g) (Supp. II 1996) applies to this case and requires that any challenge to a deportation proceeding must be brought in the court of appeals after entry of a final order. But even if Section 1252(g) did not preclude the instant suit, respondents have failed to identify any statutory provision that could plausibly be read to authorize it. In particular, the

¹ 8 U.S.C. 1252(b)(9) (Supp. II 1996) provides:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this [title] shall be available only in judicial review of a final order under this section.

It is difficult to conceive of statutory language that would more clearly foreclose the district court from adjudicating respondents' suit. Yet the court of appeals held that the suit could go forward even if Section 1252(b)(9) were assumed to apply to the instant case. Pet. App. 12a.

Administrative Procedure Act, 5 U.S.C. 701 *et seq.*—the usual means of obtaining judicial review of an administrative agency's decisions—is inapplicable because the filing of charges is not reviewable "final agency action." *FTC v. Standard Oil Co.*, 449 U.S. 232, 239-245 (1980); Pet. 15 n.5.²

C. Respondents also invoke (Br. in Opp. 15) the principle that Congress will not readily be presumed to have foreclosed judicial review of constitutional claims. We do not contend, however, that respondents' claim of selective enforcement should escape judicial review altogether—only that the claim must be heard within the context of review of a final order of deportation. In the rare case where a selective enforcement claim requires resolution of disputed factual issues, the reviewing court of appeals may transfer the case to a district court pursuant to 28 U.S.C. 2347(b)(3). See Pet. 18.

Respondents contend (Br. in Opp. 17-18 & n.12) that transfer pursuant to Section 2347(b)(3) is impermissible because judicial review of final orders of deportation is confined to the administrative record. Their position is, in essence, that Section 2347(b)(3) should be narrowly construed so as to create a remedial gap, which can then be filled by an extra-statutory cause of action filed immediately in district court. None of the cases they cite, however, involved a constitutional challenge to a deportation order that rested on factual disputes that were not and could not have been resolved through the administrative process. To permit transfer to a district court in that

² As the petition explains (at 17), the court of appeals erred in construing 8 U.S.C. 1252(f) (Supp. II 1996)—which is entitled "Limit on injunctive relief"—and is by its terms a *restriction* on the reviewing court's remedial power—as an affirmative grant of authority to the district court. See Pet. App. 249a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc). Respondents' reliance (Br. in Opp. 15 n.7) on 8 U.S.C. 1329 (1994) and 28 U.S.C. 1331 is also misplaced. Neither of those provisions creates a cause of action or authorizes adjudication of a suit against the government absent an independent waiver of sovereign immunity. Cf. *FDIC v. Meyer*, 510 U.S. 471, 475, 483-486 (1994); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37-38 (1992).

narrow class of cases is far more consonant with the text of Section 2347(b)(3) and the overall statutory scheme than is the alternative proposed by respondents and adopted by the courts below.

D. Respondents also contend (Br. in Opp. 16) that judicial review after the entry of a final deportation order would provide inadequate relief because they will suffer "ongoing First Amendment injuries" during the pendency of the administrative proceedings. That argument is not logically confined to the deportation context; it suggests that statutory exhaustion and finality requirements must give way whenever a plaintiff's challenge to agency conduct includes a claim brought under the First Amendment. Respondents cite no case supporting that proposition.³

Respondents have failed, moreover, to explain the nature of their alleged "ongoing" injury. They offer no basis for believing that their continued association with the PFLP would likely affect the outcome of the administrative process. Moreover, respondents are now forbidden by

³ Respondents rely (Br. in Opp. 15 n.9) on *Younger v. Harris*, 401 U.S. 37 (1971), and *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Younger* the Court relied on "established principles" in holding that the federal courts should generally abstain from entertaining collateral constitutional challenges to ongoing state proceedings. 401 U.S. at 54. Although the Court indicated that certain forms of bad-faith prosecution might warrant an exception to the general rule (*id.* at 48), it did not suggest that a mechanism for immediate judicial resolution of First Amendment claims is required by the Constitution. Indeed, the Court made clear that mere delay or uncertainty as to the proper resolution of First Amendment issues did not provide an adequate justification for federal intervention in ongoing state proceedings. *Id.* at 50-51. In *Freedman*, the Court held that a prompt judicial ruling was a prerequisite to any prior restraint on communicative activities. 380 U.S. at 58-59. Respondents, however, do not claim to have been the subjects of any prior restraint. The more apposite decision is *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982), which held that criminal defendants could not appeal the district court's denial of their motion to dismiss an indictment. The Court explained that defendants' claim of prosecutorial vindictiveness could adequately be reviewed on appeal from a final judgment of conviction. *Id.* at 268-270.

an entirely separate statute from providing material support to the PFLP. See Pet. 20 n.7, 23-24; pp. 7-8, *infra*. The pending deportation proceedings therefore cannot impermissibly "chill" respondents from engaging in the sort of fundraising activities for the PFLP that led the FBI to refer their cases to the INS in the first place.⁴

II. A. The thrust of the court of appeals' constitutional analysis is that the First Amendment precludes federal officials from "targeting" respondents because of their PFLP fundraising unless respondents are shown to have acted with "specific intent to pursue illegal group goals." Pet. App. 20a. Respondents assert (see Br. in Opp. 4, 10, 11, 19) that the propriety of that holding is not properly presented in this case. They contend that whatever the constitutional status of their PFLP fundraising, their participation in protected expressive activities other than fundraising was found by the district court, and conceded by the government, to be a separate and independent basis for the decision to bring deportation charges. See, *e.g.*, *id.* at 4. That contention is not supported by the record.⁵

⁴ Respondents contend (Br. in Opp. 10) that the petition is "premature" because this case (more than ten years after its inception) remains in an interlocutory posture. That contention ignores that a crucial error in the court of appeals' analysis was its decision to allow the suit to proceed in the first instance. As this case amply demonstrates, premature judicial involvement can substantially disrupt the deportation process whatever the ultimate disposition of the suit. Deferral of review until proceedings in the lower courts are complete would exacerbate that harm, yet would be unlikely to clarify the issues presented or to provide the Court with an increased understanding of the significance of the court of appeals' rulings.

⁵ Respondents' treatment of the record in this case is exemplified by their partial quotation of an FBI report offered into evidence in the district court. That report states:

Large sums of money are being collected by the PFLP in the United States to fund its violence and terror machine. This document hopes to identify key PFLP people in Southern California sufficiently enough so that law enforcement agencies capable of disrupting the PFLP's activities through legal action can do so.

In the footnote on which respondents principally rely, the district court stated that at the time the charges were filed, the government "believed * * * that it could deport [respondents] merely for associating with the PFLP." Pet. App. 75a n.14. That statement does not purport to be a "finding" as to the actual motivation of government officials, much less a finding whose accuracy the government has conceded. As we explained in the court of appeals,

regardless of what the responsible Government officials believed *could* as a matter of law be sufficient grounds for [respondents'] deportation, we submitted evidence showing that the FBI discovered what it understood to be substantial fundraising activity by [respondents] on behalf of the PFLP for money to be sent overseas, that it reported this evidence to the INS, and the INS district counsel then drafted deportation charges based on that evidence. Furthermore, the Government has made quite clear to the district court that, if it is ever allowed to proceed with the administrative deportation proceedings, we will show that both Hamide and Shehadeh were engaged in fundraising for the PFLP.

The district court has made no factual-finding in the face of this evidence that [respondents'] fundraising activities were not the reason that deportation charges were prepared and filed. Thus, [respondents'] contention that the district court has made some cardinal factual findings that we do not dispute and that undermine our legal arguments is wrong.

Gov't C.A. Reply Br. 13-14 (footnote omitted).

All of the associational activities to which respondents allude, moreover, are part of a single course of conduct. This is not a case in which "legitimate" and "illegitimate"

C.A. Supp. E.R. 354 (emphasis added). Respondents quote only the underscored language (see Br. in Opp. 4), omitting the reference to PFLP fundraising efforts—a reference that is obviously crucial in determining the purpose of the investigation here.

bases for governmental action are separate and distinct. It is farfetched to suppose that immigration officials would have declined to initiate deportation proceedings if they had limited their inquiry to fundraising—some of the most harmful and clearly unprotected aspects of respondents' PFLP-related activities.⁶

B. As the petition explains (Pet. 23-25), the AADC III court's First Amendment analysis casts significant doubt upon the constitutionality of a federal criminal statute (now codified at 18 U.S.C. 2339B (Supp. II 1996)) and an Executive Order (No. 12,947, 60 Fed. Reg. 5079 (1995)), which forbid the provision of material support to designated foreign terrorist organizations, including the

⁶ Respondents also suggest (see Br. in Opp. 6 n.4, 20 & n.15) that the record evidence fails to establish their participation in PFLP fundraising activities. The *actual* nature and extent of respondents' fundraising, however, is irrelevant to the proper resolution of their selective enforcement claims. At least so long as the government acted in the reasonable belief that respondents had raised money for the PFLP, respondents could not establish impermissible selective enforcement simply by demonstrating that the government's belief was wrong. See *Cameron v. Johnson*, 390 U.S. 611, 621 (1968) (plaintiff could not establish bad-faith prosecution warranting injunctive relief simply by showing that the evidence would not support a conviction on the criminal charge); cf. *Waters v. Churchill*, 511 U.S. 661, 677-678 (1994) (plurality opinion); *id.* at 686-694 (Scalia, J., concurring in the judgment). The government's assessment of respondents' fundraising activities was plainly reasonable, given the terrorist record of the PFLP, other investigative information obtained about PFLP fundraising in the United States, and the militaristic nature of the specific fundraising events in which respondents engaged. See Pet. App. 60a-62a, 68a.

Respondents err in asserting (Br. in Opp. 6 n.4) that the evidence showed that all funds raised were designated for a tax-exempt humanitarian aid organization. The district court's opinion, at the very page respondents cite (Pet. App. 63a), demonstrates otherwise. See also C.A. E.R. 46 (Knight Decl. ¶ 138). The actual nature and extent of Hamide and Shehadeh's PFLP-related activities will of course be crucial to the ultimate disposition of the deportation charges against them. The courts have no authority, however, to resolve those issues in advance of the administrative proceedings under the rubric of adjudicating a selective enforcement claim.

PFLP.⁷ The court of appeals' decision threatens to undermine enforcement of those prohibitions, both by reducing their deterrent value and by diminishing the likelihood that violators can be successfully prosecuted.⁸

C. As respondents observe (see Br. in Opp. 22-23 & n.16), this Court has held in various contexts that restrictions on the solicitation and donation of funds for a domestic organization raise First Amendment concerns. None of those decisions, however, casts doubt upon the authority of the political Branches to bar the provision of material support to *foreign* organizations whose violent activities are deemed inimical to United States national security and foreign policy interests.⁹ With respect to that ques-

⁷ Because the fundraising activities at issue in this case predated the enactment of Section 2339B and the signing of the Executive Order, respondents would not be subject to criminal prosecution based on those activities. The fact that respondents' fundraising violated no federal criminal law, however, does not mean that it was constitutionally protected conduct. There is consequently no basis for respondents' reliance on the testimony of then-FBI Director William Webster that "if these individuals had been United States citizens, there would not have been a basis for their arrest." C.A. Supp. E.R. 93; see Br. in Opp. 2. Director Webster's statement appears simply to have been an acknowledgment that no then-existing criminal statute forbade respondents' PFLP-related activities, not a concession that the Constitution would preclude the imposition of criminal sanctions for this type of conduct.

⁸ Section 2339B is currently the subject of a First Amendment challenge filed in the United States District Court for the Central District of California. See *Humanitarian Law Project, et al. v. Reno, et al.*, No. 98-1971 ABC (BQRx) (HLP). Plaintiffs in HLP—represented by counsel of record for respondents in the instant case—contend that a preliminary injunction against enforcement of Section 2339B "is required by" the Ninth Circuit's decision in *AADC III*. See Reply Memorandum of Points & Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction 1 (filed May 11, 1998). They argue that "[t]he law in the Ninth Circuit is clear: the First Amendment bars the government from penalizing individuals for providing material support to a foreign organization unless the government shows that the individuals had 'the specific intent to pursue illegal group goals.'" *Id.* at 2.

⁹ Respondents suggest (Br. in Opp. 24) that a ban on material support to the PFLP amounts to prohibited "viewpoint-based discrimina-

tion, the more relevant precedent is *Regan v. Wald*, 468 U.S. 222 (1984), which upheld a Treasury Department regulation prohibiting any transaction involving property belonging to Cuba or any Cuban national. See Pet. 22-23.

Respondents contend (Br. in Opp. 25 n.19) that a ban on financial transactions with foreign countries is constitutionally distinguishable from a comparable ban on transactions with foreign political organizations. The same foreign policy and national security concerns that justify sanctions against foreign governments, however, apply with equal (or greater) force to foreign terrorist organizations whose violent actions threaten American interests. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a), 110 Stat. 1247 (congressional findings regarding the threat posed by foreign terrorist organizations); Pet. 23-25 & nn. 11-12.¹⁰ The

tion." As the D.C. Circuit has recognized, "[t]o hold that the government cannot make viewpoint-based choices in foreign aid and foreign affairs would not only depart from settled precedent, but would work much mischief." *DKT Memorial Fund v. Agency for Int'l Dev.*, 887 F.2d 275, 290 (1989). The development of U.S. foreign policy inevitably requires that distinctions be drawn between overseas entities (both governmental and non-governmental) that are friendly to U.S. interests and those that are hostile. Material support to the PFLP is forbidden, moreover, not because the money may be used to fund the expression of unpopular opinions, but because of the tangible consequences of the PFLP's violent conduct.

There is similarly no basis for the contention (Br. in Opp. 24) that the ban on material support constitutes impermissible "guilt by association." This Court has held that the government may not impose punishment based on "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the government." *Healy v. James*, 408 U.S. 169, 186 (1972). Because funds provided to the PFLP may be used for violent purposes irrespective of the donor's intent, see Pet. 25 n.12, provision of funds without more "poses the threat feared by the government." That is true even where the provision of money is prompted by a non-ideological motive, as when funds are provided in the context of a commercial transaction.

¹⁰ Unlike even rogue states, terrorist organizations do not submit to international legal principles or institutions, United Nations jurisdiction, or treaty obligations.

apparent consequence of respondents' position is that U.S. residents may be prohibited from providing funds to foreign governments that support the PFLP, but may not be barred (absent specific intent to further unlawful activity) from providing funds to the PFLP itself. Nothing in this Court's decisions supports that incongruous result.

D. Respondents maintain (Br. in Opp. 25-27) that the First Amendment principles governing the United States government's relationship with its citizens can be applied in their entirety to the context of deportation. This Court has long recognized, however, that decisions regarding an alien's right to enter and remain in this country are largely entrusted to the political Branches. See Pet. 27-29. Those decisions may permissibly be based on associational activities that would be protected by the First Amendment if engaged in by a citizen. This Court's precedents make clear that an alien may be deported on the basis of meaningful membership in an organization that advocates violence, even if the alien does not personally espouse or know of that tenet of the organization. See *Galven v. Press*, 347 U.S. 522, 530 (1954); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469, 472 n.2 (1963); Pet. 28-29. The Ninth Circuit's holding that respondents may not be subjected to deportation because of fundraising on behalf of the PFLP without a showing that they specifically intended to further the PFLP's violent activities cannot be squared with those precedents.

* * * * *

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

MAY 1998

APR 16 1998

CLERK

No. 97-1252

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

JANET RENO, Attorney General, *et al.*,
Petitioners,

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF WASHINGTON LEGAL FOUNDATION,
JEWISH INSTITUTE FOR NATIONAL SECURITY
AFFAIRS, JEWISH POLICY CENTER, CHRISTIANS'
ISRAEL PUBLIC ACTION CAMPAIGN, AND
ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: April 16, 1998

25 PP

QUESTION PRESENTED

Amici curiae address the following questions only:

- (1) Whether the First Amendment prohibits the federal government from conducting deportation proceedings against aliens who engage in fundraising activities for an international terrorist organization with full knowledge of the organization's terrorist activities, where the government cannot demonstrate that the aliens had specific intent to advance the organization's terroristic goals, but rather an intent merely to advance the organization's nonviolent goals.
- (2) Whether the Fifth Amendment prohibits the federal government from conducting deportation proceedings against aliens present in the United States without permission, where the aliens can demonstrate that the federal government is proceeding against them because of their association with an international terrorist organization and is not initiating similar proceedings against those associated with other organizations which are deemed less objectionable by the federal government but which nevertheless also advocate violence and destruction of property.

Amici curiae do not address jurisdictional issues raised by the petition.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	7
I. THE NINTH CIRCUIT'S RULING PROVIDES UNWARRANTED FIRST AMENDMENT PRO- TECTION TO THOSE WHO RAISE FUNDS FOR TERRORIST ORGANIZATIONS	8
II. INITIATING DEPORTATION PROCEEDINGS SELECTIVELY AGAINST MEMBERS OF TER- RORIST GROUPS THAT THE GOVERNMENT BELIEVES ARE A THREAT TO AMERICAN SECURITY INTERESTS DOES NOT VIOLATE EQUAL PROTECTION	15
III. THE PFLP IS A PARTICULARLY VIOLENT AND ANTI-AMERICAN GROUP WHOSE ACTIVITIES SHOULD BE RESTRICTED TO THE GREATEST EXTENT POSSIBLE	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases:	Page
<i>Galvan v. Press</i> , 347 U.S. 522 (1954)	9, 13, 14
<i>Gastelum-Quinines v. Kennedy</i> , 374 U.S. 469 (1963)	14
<i>Healy v. James</i> , 408 U.S. 169 (1972)	10, 11
<i>Immigration and Naturalization Service v.</i> <i>Lopez-Mendoza</i> , 468 U.S. 1032 (1984)	14
<i>McCleskey v. Kemp</i> , 481 U.S. 279 (1987)	16
<i>Mathews v. Diaz</i> , 426 U.S. 67 (1976)	9
<i>Palestinian Information Office v. Shultz</i> , 853 F.2d 932 (D.C. Cir. 1988)	1, 11
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989)	13
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	9
<i>Scales v. United States</i> , 367 U.S. 203 (1961)	14
<i>United States v. Armstrong</i> , 116 S. Ct. 1480 (1996)	16
<i>United States v. O'Brien</i> , 391 U.S. 367 (1968)	7, 11, 12
<i>United States v. Robel</i> , 389 U.S. 258 (1967)	10-11
<i>Wayte v. United States</i> , 470 U.S. 598 (1985)	5, 9, 16, 17, 18

Statutes and Constitutional Provisions:

U.S. Const., Amend I	<i>passim</i>
U.S. Const., Amend V	5, 6, 17
Due Process Clause	5
Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. . No. 104-132	7
§ 302(a), 8 U.S.C. § 1189(a)	17
8 U.S.C. § 1182(a)(3)(B)(iii)	4
8 U.S.C. § 1227(a)(4)(B)	4
8 U.S.C. § 1251(a)(2)	3
8 U.S.C. § 1251(a)(6)(F)(iii) (1982)	3
8 U.S.C. § 1251(a)(9)	3
8 U.S.C. § 1255a	3

Miscellaneous:

62 Fed. Reg. 52,650 (Oct. 8, 1997)	17
Agence France-Presse, "Israel Arrests 10 Suspected PFLP Members Near Ramallah," (Dec. 5, 1997)	19
Agence France Presse, "Palestinian Group Denounces 'U.S. Threats' Against Baghdad," (Nov. 10, 1997)	20
Sunday Times of London, "Kill the Jackel," (Dec. 14, 1997)	19

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states.¹ While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared before this Court as well as other federal courts to ensure that aliens who engage in terrorism or other criminal activities are not permitted to pursue their criminal goals while in this country. See, e.g., *Ogbomon v. United States*, 117 S. Ct. 725 (1997); *Immigration and Naturalization Service v. Eramly*, 117 S. Ct. 31 (1996); *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988).

The Jewish Institute for National Security Affairs (JINSA) is a non-profit, non-partisan, educational organization committed to explaining the need for a prudent national security policy for the U.S., addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies. Founded as a result of the lessons learned from the 1973 Yom Kippur War, JINSA communicates with the national security establishment and the general public to explain the role Israel can and does play in bolstering American interests, as well as the link between American defense policy and the security of Israel.

The Jewish Policy Center is a § 501(c)(3) organization dedicated to creating, articulating, examining, and advocating conservative approaches to social, economic, and foreign

¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

policy issues from the perspective of the Jewish community. By providing a particularly Jewish insight, the JPC hopes to make a unique and valuable contribution to the ongoing policy debates affecting our community, our country, and our world.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Christians' Israel Public Action Campaign is a nonprofit organization that addresses laws and policies related to Israel and advocates a strong U.S.-Israel relationship. CIPAC was founded in 1989 to mobilize support for Israel within the Christian community.

The Popular Front for the Liberation of Palestine has been determined by Secretary of State Madeleine Albright to be a "foreign terrorist organization." The United States has a vital interest in taking strong measures to combat international terrorists who threaten our national security. *Amici* believe that one effective measure is denying American fundraising sources to such organizations. *Amici* do not believe that the U.S. Constitution protects the activities of those who engage in fundraising for such organizations with full knowledge of the organizations' purposes.

Amici submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement contained in the Petition for a Writ of Certiorari.

In brief, the federal government has been attempting since 1987 to deport eight aliens because they have engaged in fundraising for the Popular Front for the Liberation of Palestine (PFLP), a terrorist organization that has proclaimed the United States to be one of its principal enemies. The federal government has been unable to go forward with those proceedings, however, due to an injunction issued by the United States District Court for the Central District of California.

At the time that deportation proceedings were initiated in January 1987, two of the eight Respondents (Khader Hamide and Michel Shehadeh) were permanent resident aliens; the other six were in this country under temporary visas. Two of those six (Aiad Barakat and Naim Sharif) recently were granted temporary resident status pursuant to 8 U.S.C. § 1255a; the other four (Julie Mungai, Amjad Obeid, Oyman Obeid, and Bashar Amer) concede that their continued presence in this country violates the terms of their temporary visas, which have long since expired.

The four non-resident aliens are alleged to be deportable on the ground that they failed to maintain student status (8 U.S.C. § 1251(a)(9)), worked without authorization, or overstayed a visit (8 U.S.C. § 1251(a)(2)). See Petition Appendix ("Pet. App.") 79a-81a. The two permanent resident aliens (Respondents Hamide and Shehadeh) initially were alleged to be deportable under 8 U.S.C. § 1251(a)(6)(F)(iii)

(1982) as "members of . . . [an] organization that advocates or teaches . . . the unlawful damage, injury, or destruction of property." Following revision of the immigration laws in 1990, the Immigration and Naturalization Service (INS) added charges against Hamide and Shehadeh under 8 U.S.C. § 1227(a)(4)(B), which renders deportable any alien who "at any time after entry engages in terrorist activity."² The two temporary resident aliens (Respondents Barakat and Sharif) were alleged to be deportable for visa violations. Pet. App. 3a-4a. The federal government concedes that, as a result of their recent receipt of temporary resident status, Barakat and Sharif are no longer subject to deportation on the visa violation charges (Pet. at 7 n.4), and there are no other charges currently pending against those two.

Respondents filed suit in federal district court in April 1987, seeking an injunction against the deportation proceedings. They claimed that basing deportation on their fundraising activities for the PFLP violated their rights under the First Amendment. They also claimed that *all* of the charges (including those alleging visa violations) infringed on their constitutional rights against "selective enforcement" because the charges allegedly were filed in retaliation for their association with the PFLP. Pet. App. 5a.³

² The term "engage in terrorist activity" is defined under 8 U.S.C. § 1182(a)(3)(B)(iii) to include committing "an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity," including "[t]he soliciting of funds or other things of value for terrorist activity or for any terrorist organization."

³ Both Respondents and the Ninth Circuit have characterized the "selective enforcement" claims as arising under the First Amendment. Strictly speaking, however, those claims arise under the equal protection (continued...)

The district court issued a preliminary injunction in 1994, barring further deportation proceedings based on the visa violation charges against the non-resident alien Respondents. Pet. App. 138a-150a. It found that those Respondents were likely to succeed on their selective prosecution claims, because they had demonstrated that the INS had not brought similar deportation proceedings against those associated with terrorist groups whose views the federal government endorses or tolerates. *Id.* The U.S. Court of Appeals for the Ninth Circuit affirmed the injunction, but reversed the district court's ruling that it lacked jurisdiction over the claims of the two permanent resident aliens (Respondents Hamide and Shehadeh). Pet. App. 77a-128a.

On remand, Petitioners offered extensive additional evidence to the district court regarding the extent of Respondents' fundraising activities for the PFLP and the widespread nature of the PFLP's terroristic activities. The district court nonetheless refused to dissolve the existing injunction and broadened it to include a prohibition of proceedings against Respondents Hamide and Shehadeh. Pet. App. 44a-76a. The district court also denied a government motion to dismiss the proceedings, which argued that 1996 amendments to the immigration laws had deprived federal courts of whatever jurisdiction they had to hear challenges to the conduct of deportation hearings. Pet. App. 22a-44a.

³(...continued)

component of the Fifth Amendment's Due Process Clause, which prohibits prosecutions "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification, . . . including the exercise of protected statutory and constitutional rights." *Wayte v. United States*, 470 U.S. 598, 608 (1985)(internal citations omitted).

In July 1997, the Ninth Circuit affirmed both the district court's decision on jurisdiction and its decision to keep the injunction in place. Pet. App. 1a-21a. The Ninth Circuit held, with respect to the non-resident alien Respondents, that the government was not entitled to dissolution of the prior injunction (which had previously been affirmed on appeal) because it had failed to "demonstrate[] changed circumstances." *Id.* at 17a.

The appeals court also upheld the preliminary injunction with respect to Respondents Hamide and Shehadeh, holding that the district court did not err in finding both "disparate impact" and "improper motive" in connection with those Respondents' selective enforcement claims. *Id.* at 18a-21a. The Ninth Circuit held that the district court's selective enforcement - finding properly relied on evidence "of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property." *Id.* at 19a. The appeals court held that "improper motive" was demonstrated by a showing that Respondents were targeted because of their "associational activities with particular disfavored groups" -- at least in the absence of evidence from the government that those targeted harbored a "specific intent to further the PFLP's unlawful aims." *Id.* at 19a-20a.

Finally, the Ninth Circuit held that, quite apart from any Fifth Amendment "selective prosecution" claim, Respondents had a First Amendment right not to be deported for fundraising activities on behalf of a group (like the PFLP) that engages in *some* activities that are not illegal -- in the absence of government evidence "that group members had the specific intent to pursue illegal group goals." *Id.* at 20a. The court

rejected the government's argument that Petitioners' First Amendment claims should be judged under the more relaxed standards articulated in *United States v. O'Brien*, 391 U.S. 367 (1968) (holding that government has more latitude in restricting expressive conduct than in curtailing pure speech). *Id.* The court held that the *O'Brien* standard "is inapplicable in a case such as this one, in which the restrictions are in effect content-based." *Id.*

REASONS FOR GRANTING THE PETITION

This case raises a number of issues of exceptional importance that warrant review by the Court. In particular, the case raises fundamental questions about the power of Congress and the Executive Branch to control the flow of aliens into this country and to protect American security interests by excluding those aliens deemed to represent a threat to American interests.

In its decision in this case, the Ninth Circuit badly fumbled in its efforts to deal with these national security issues. It announced a broad First Amendment rule that will interfere with the federal government's ability to prevent those in this country from taking steps that will assist international terrorist groups. Read literally, the Ninth Circuit's decision renders unconstitutional several key provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, which prescribes criminal penalties for those (whether aliens or citizens) who knowingly provide material support for organizations (such as the PFLP) that have been designated as "foreign terrorist organizations" by the Secretary of State.

The Ninth Circuit's "selective prosecution" holding is similarly problematical. While conceding to the federal government the right to crack down on those actively engaged in violent, terroristic activity, the Ninth Circuit insists that the federal government must practice agnosticism when it comes to dealing with terrorist organizations and their members. According to the Ninth Circuit, the federal government may not pick and choose among terrorist organizations, deciding that one group represents a threat to national interests while another does not. Pet. App. 18a-21a. That ruling strikes at the heart of the federal government's power to protect national interests, a power that has traditionally been outside the province of the judiciary. The Executive Branch generally would have little reason to crack down on a foreign terrorist organization unless that organization represented a threat to American security interests; it certainly would not want to do so if the organization were deemed to *promote* American interests. The Ninth Circuit's rule requiring the federal government to treat all terrorist groups alike undermines the Executive Branch's ability to conduct foreign affairs in a manner designed to optimize national security, and represents a significant judicial intrusion into matters normally reserved to the political branches of government.

I. THE NINTH CIRCUIT RULING PROVIDES UNWARRANTED FIRST AMENDMENT PROTECTION TO THOSE WHO RAISE FUNDS FOR TERRORIST ORGANIZATIONS

The judiciary has, quite correctly, been extremely reluctant to second-guess Congress and the Executive Branch with respect to immigration and naturalization matters. As this Court has recognized, "For reasons long recognized as valid, the responsibility for regulating the relationship

between the United States and our alien visitors has been committed to the political branches of the Federal Government." *Reno v. Flores*, 507 U.S. 292, 305 (1993) (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). The power of the political branches "over the admission of aliens and their right to remain is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security." *Galvan v. Press*, 347 U.S. 522, 530 (1954). Indeed:

Few interests can be more compelling than a nation's need to ensure its own security. It is well to remember that freedom as we know it has been suppressed in many countries. Unless a society has the capability and will to defend itself from the aggression of others, constitutional protections of any sort have little meaning.

Wayte v. United States, 470 U.S. 598, 611 (1985).

The Ninth Circuit nonetheless in this case overruled the Executive Branch's determination that national security required initiation of deportation proceedings against Respondents Hamide and Shehadeh. The appeals court held that, regardless of the national security interests at stake, the First Amendment prohibits the Executive Branch from initiating deportation proceedings against aliens who raise funds for terrorist groups, in the absence of proof from the government that the aliens "had the specific intent to pursue illegal group goals." Pet. App. 20a. But it often will be quite difficult for the government to gather such evidence of specific intent, particularly when (as is true of the PFLP) the terrorist group at issue engages in at least *some* non-terrorist activities. The effect of the Ninth Circuit's rule, then, is to eliminate the federal government's ability to cut off the flow

of domestic funds to even the most violent and anti-American of terrorist groups.

The case law cited by the Ninth Circuit does not support its broad interpretation of First Amendment rights. The appeals court relied principally on *Healy v. James*, 408 U.S. 169 (1972). *Healy* held that the First Amendment prohibited a public college from interfering with the associational rights of students who wished to form a local chapter of Students for a Democratic Society (SDS), where the sole reason for the interference was the national SDS organization's advocacy of violent campus disruptions and there was no evidence that members of the local chapter intended to engage in similarly disruptive behavior. *Healy*, 408 U.S. at 188-191. The Court held that students could not be sanctioned solely because of their "association with an unpopular organization" (*id.* at 186) and that "[t]he critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." *Id.* at 188 (internal citations omitted).

But the Ninth Circuit overlooked the critical distinction between *Healy* and the instant case: Respondents have not been engaged in "mere advocacy." Rather, unlike the students in *Healy*, they have been actively fundraising for a terrorist group.⁴ While fundraising is an activity that has

⁴ The Court stated in *Healy*:

In these cases, it has been established that "guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government," is an impermissible basis upon which to deny First Amendment rights. *United States v. Robel*, 389 (continued...)

communicative elements, the Court has never suggested that the government is thereby precluded from seeking to regulate the nonspeech aspects of fundraising.

Indeed, there is considerable question whether *Healy* has any application at all in an international context. The U.S. Court of Appeals for the District of Columbia Circuit, for example, has held that *Healy* is limited to cases involving individuals seeking to associate with a domestic organization:

No court has ever found in the right to freedom of association a right to *represent* a foreign entity on American soil. The cases cited by appellants for this proposition are inapposite because, arising in the domestic context, they do not speak to the crucial issue of representation of foreign entities. See, e.g., *Healy v. James*, 408 U.S. 169 (1972).

Palestinian Information Office v. Shultz, 853 F.2d 932 (D.C. Cir. 1988).

The Ninth Circuit's decision is inconsistent with the more relaxed standard set down by this Court in *United States v.*

⁴(...continued)

U.S. [258,] 265 [(1967)]. The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals and a specific intent to further those illegal aims.

Healy, 408 U.S. at 186. But the line of cases referenced in *Healy* dealt with government efforts to sanction individuals based solely on their membership in a disfavored organization. The Court has never held that "a specific intent to further [an organization's] illegal aims" is required when an individual goes beyond mere association and actually engages in conduct that, wittingly or not, furthers those illegal aims.

O'Brien, 391 U.S. 367, 376 (1968), for judging whether the First Amendment prohibits government attempts to regulate conduct that has both "speech" and "nonspeech" elements. Government regulation of such conduct is justified:

[I]f it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

O'Brien, 391 U.S. at 377.

The Ninth Circuit declined to apply the *O'Brien* standard to this case, on the ground that the restrictions imposed on Respondents' fundraising activities were "in effect content-based." Pet. App. 20a. In so holding, the appeals court has confused the speech and nonspeech aspects of Respondents' fundraising. Such activity is expressive to the extent that it constitutes a show of *political* support for the PFLP, but it is also nonexpressive conduct to the extent that it provides *material* support for a terrorist organization. The federal government has every right to take strong measures to prevent terrorist organizations deemed a threat to American security from receiving material support; such measures do not become "content-based" merely because they pick and choose among terrorist groups in determining which of those groups constitute a threat to American security. So long as the federal government is not targeting Respondents for deportation merely because they have chosen to affiliate themselves with the PFLP, Respondents' First Amendment claims ought to be judged under the *O'Brien* standard. The

Ninth Circuit's failure to apply the proper standard warrants review by this Court.

The Ninth Circuit went on to hold, alternatively, that even if the INS could properly have proceeded with deportation proceedings against Respondents based on a desire to stop their fundraising, the district court had correctly enjoined the proceedings based on a finding (allegedly uncontested by the government) "that the INS targeted [Respondents] for their mere association with the PFLP." Pet. App. 21a. But if, in fact, the government had a mixed motive for seeking deportation, with one motive (preventing material support from reaching terrorist groups) being permissible and the other motive (punishing those who merely associate with terrorist groups) being constitutionally impermissible, then issuing an injunction would not be inappropriate in every case. Rather, in a mixed-motive case, the government is entitled to an opportunity to demonstrate that it would have gone forward with deportation proceedings even if it had not harbored the impermissible motivation. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Accordingly, the Ninth Circuit's alternative rationale adds nothing to its holding and does not provide a reason for this Court declining to grant review.

Moreover, even if the First Amendment were deemed broad enough to protect citizens and/or aliens from *criminal* prosecution for engaging in fundraising on behalf of foreign terrorist groups, it does not necessarily serve as a bar to deportation proceedings, which are civil in nature. In its numerous decisions addressing permissible government restrictions on Communist Party membership, the Court has regularly rested its holdings on that criminal/civil distinction. For example, in *Galvan*, the Court upheld the deportation of

an alien who joined the Communist Party, in the absence of evidence that he joined accidentally. *Galvan*, 347 U.S. at 528. But the Court later limited criminal prosecution under the Smith Act (which prohibited membership in the Communist Party) to those who were "active" members. *Scales v. United States*, 367 U.S. 203, 221-22 (1961). The Court stated that the case would have raised "close constitutional questions" if the Smith Act were construed as criminalizing even "passive" membership in the Party, and that the provision at issue in *Galvan* presented an easier case because it "rested on Congress' far more plenary power over aliens, and hence did not press nearly so closely on the limits of constitutionality as this enactment." *Id.* at 222. *See also, Immigration and Naturalization Service v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (exclusionary rule does not bar use at deportation hearing of admissions made by alien following illegal arrest, because deportation hearings are civil proceedings, not criminal).

Furthermore, the Court's decisions addressing the deportation of Communist Party members have interpreted immigration law as limiting deportation on grounds of such membership to those with a "meaningful association" with the Party; as so construed, the immigration laws do not violate the First Amendment. *See, e.g., Gastelum-Quinines v. Kennedy*, 374 U.S. 469, 471 (1963). It cannot seriously be disputed that engaging in fundraising for an organization constitutes a "meaningful association" with that group. The decision below thus appears to be seriously in conflict with decisions from this Court regarding First Amendment limitations on the government's power to deport aliens based on their membership in disfavored organizations.

In light of the importance of the national security concerns raised by this case, review is warranted in order to resolve the conflict between the Ninth Circuit decision and previous First Amendment decisions of this Court.

II. INITIATING DEPORTATION PROCEEDINGS SELECTIVELY AGAINST MEMBERS OF TERRORIST GROUPS THAT THE GOVERNMENT BELIEVES ARE A THREAT TO AMERICAN SECURITY INTERESTS DOES NOT VIOLATE EQUAL PROTECTION

Respondents Hamide and Shehadeh also claim that the charges brought against them infringe on their constitutional right against "selective enforcement" because the charges allegedly were filed in retaliation for their association with the PFLP. The four non-resident alien Respondents (Mungai, Amjad Obeid, Oyman Obeid, and Amer) make a similar selective enforcement claim; indeed, that claim is the *only* claim raised by the four non-resident alien Respondents, inasmuch as they do not contest the validity of the visa violation charges brought against them.

The Ninth Circuit upheld the selective enforcement claims, finding that Respondents were selected for enforcement proceedings solely because of their association with a disfavored terrorist organization. The appeals court based its ruling on findings both that the government's enforcement policy had a disparate impact on those who associate with the PFLP and that the policy was based on an "impermissible motive" -- a desire to deport individuals who associate with disfavored terrorist groups. Pet. App. 18a-20a.

Evidence submitted by Respondents falls far short of what is necessary to make out a selective enforcement claim. Claims of selective prosecution are governed by "ordinary equal protection standards." *Wayte*, 470 U.S. at 608. In criminal prosecutions, a defendant asserting a selective enforcement claim must demonstrate *both* a "discriminatory effect" *and* a "discriminatory purpose." *Id.* Because of special considerations implicated by judicial inquiry into an exercise of prosecutorial discretion, those two elements of the claim must be satisfied by "exceptionally clear proof." *McCleskey v. Kemp*, 481 U.S. 279, 297 (1987). For the reasons outlined above, an even higher standard of proof should be required when, as here, a selective enforcement claim is made in connection with a civil proceeding.

The Court recently reaffirmed that a selective enforcement claim requires proof that "the Government has failed to prosecute others who are similarly situated to the defendant." *United States v. Armstrong*, 116 S. Ct. 1480, 1488 (1996). A defendant is "similarly situated" to others not charged if the decision to charge the defendant but not other similar offenders was "based upon an unjustifiable standard such as race, religion, or other arbitrary classification . . . including the exercise of protected statutory and constitutional rights." *Wayte*, 470 U.S. at 608. Respondents' claim is thus without merit because they have failed to provide *any* evidence that aliens providing material support to terrorist groups *deemed a threat to national security* are not being targeted for deportation.

In upholding Respondents' selective enforcement claims, the Ninth Circuit cited evidence that the government had not brought similar charges against aliens who had engaged in fundraising for other groups that engage in violent activities.

Pet. App. 18a (citing an alien who raised funds for a Mujahedin guerrilla organization and another who raised funds for the Nicaraguan Contras). But the evidence indicates that those individuals are *not* "similarly situated" to Respondents. The organizations for which they raised funds have not been identified as a threat to national security, as has the PFLP. See 62 Fed. Reg. 52,650 (Oct. 8, 1997) (Secretary of State's designation of PFLP and 29 other groups as "foreign terrorist organizations" within the meaning of § 302(a) of the Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1189(a)).

Incredibly, although the Ninth Circuit found that PFLP fundraisers *necessarily* are "similarly situated" to fundraisers for other groups that "advocat[e] violence and the destruction of property" (Pet. App. 18a), its opinions contain absolutely no rationale for that finding and no discussion regarding what constitutes an appropriate control group. Thus, the appeals court failed to discuss an inevitable effect of its holding: it prohibits the government from taking into account, when deciding whether to seek deportation of a fundraiser for a group that advocates violence, whether the group threatens American security interests.

Contrary to the Ninth Circuit's holding, nothing in the First or Fifth Amendments prohibits the government from so determining. In *Wayte*, the Court's only recent selective enforcement decision involving a claim that a defendant was selected for prosecution based on exercise of First Amendment rights, the Court explicitly recognized that "[f]ew interests can be more compelling than a nation's need to ensure its own security." *Wayte*, 470 U.S. at 611. In order to prevail on their claims, Respondents would need to show that "the enforcement policy selected [individuals] for prosecution

on the basis of their speech." *Id.* at 609. But the evidence indicates that Respondents were targeted because their *actions* (providing material support for a terrorist group) threaten American security interests, while the actions of others not targeted do not pose a similar threat. While it is true that Respondents' actions have an expressive component (i.e., the actions constitute an expression of support for the PFLP), the evidence indicates that the decision to target Respondents and not, say, members of the Nicaraguan Contras was based on a nonexpressive component of their actions (the threat to national security caused by the provision of material support to a terrorist group that views the United States as an enemy).⁵

Because of the importance of the issues involved, the Court should grant the Petition in order to resolve the clear conflict between the decision below and this Court's decision in *Wayte* regarding the evidence necessary to establish a selective enforcement claim.

III. THE PFLP IS A PARTICULARLY VIOLENT AND ANTI-AMERICAN GROUP WHOSE ACTIVITIES SHOULD BE RESTRICTED TO THE GREATEST EXTENT POSSIBLE

Review of the decision below is also warranted because of the particularly violent and anti-American nature of the

⁵ The Ninth Circuit's 1997 decision declined to reconsider the propriety of the district court's preliminary injunction with respect to the four non-resident alien Respondents, because it had previously upheld the injunction and Petitioners had failed to demonstrate "changed circumstances that would render continuance of [the] injunction in its original form inequitable." Pet. App. 17a. This Court is not similarly constrained by such prudential considerations, because it has not previously considered the propriety of the injunction.

PFLP. There are very few terrorist groups in the world today that pose as great a threat to American security as does the PFLP. If allowed to stand, the Ninth Circuit's decision is an open invitation to the PFLP to increase its American-based fundraising and to use those funds to increase activities that threaten American lives.

As the Petition indicates, the PFLP recently celebrated the 30th anniversary of its 1967 founding. It has long proclaimed the United States to be one of its principal enemies. Among its many acts of international terrorism, the PFLP has hijacked numerous planes, killed 16 Americans at Israel's Lod Airport, and assassinated the U.S. Ambassador to Lebanon in 1976. Pet. at 2.

One of the PFLP's best-known members was Venezuelan-born terrorist Illich Ramirez Sanchez, better known as "Carlos the Jackel." Carlos received his training from the PFLP and, acting under the auspices of the PFLP, masterminded the kidnapping of OPEC oil ministers in Vienna in 1975. See, "Kill the Jackel," Sunday Times of London (Dec. 14, 1997).

The PFLP has been bitterly opposed to the 1993 Oslo peace accords between Israel and the Palestinian Liberation Organization (PLO), has suspended its participation in the PLO, and has been engaged in terrorist activity designed to undermine those accords. It has been implicated in numerous drive-by shooting attacks on Israeli citizens in recent months. See, "Israel Arrests 10 Suspected PFLP Members Near Ramallah," Agence France-Presse (Dec. 5, 1997). It recently issued a statement denouncing United States "threats" against Iraq and calling on Arab nations to "defy" the U.S. and "stand up to the policies of Washington." See, "Palestinian Group

Denounces 'U.S. Threats' Against Baghdad," Agence France-Presse (Nov. 10, 1997).

Surely, given the PFLP's history, the federal government has a strong interest in protecting American national interests by doing all it can to deny funding to the PFLP. Respondents do not dispute that they provided such funding, nor do they dispute that they are well aware of the PFLP's bloody history and its avowed opposition to United States policies. The federal courts have no business providing a shield to those who fundraise in support of such terrorist activity. Regardless whether fundraisers personally support terrorist activity or whether (as Respondents claim) they merely support the terrorist group's nonviolent activities, such fundraisers are undeniably facilitating terrorist acts that threaten America's national security. Given the magnitude of the threat posed by the PFLP, it is particularly important that the Court review the Ninth Circuit's decision, which renders this nation powerless to take steps to deprive its enemies of financial resources.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court grant the Petition.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: April 16, 1998

5
No. 97-1252

Supreme Court, U.S.
FILED

JUL 16 1998

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ET AL., PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

SETH P. WAXMAN
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record
for Petitioners

DAVID D. COLE
Center for Constitutional
Rights
Georgetown University Law
Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9078

Counsel of Record
for Respondents

Petition For Certiorari Filed: January 30, 1998
Certiorari Granted: June 1, 1998

2/6 PP

TABLE OF CONTENTS

	Page
District Court Docket Entries	1
Court of Appeals Docket Entries	11
Second Amended Complaint for Declaratory Relief and Injunctive Relief	17
Defendants' Motion to Dismiss	53
Defendants' Memorandum in Support of Motion to Dismiss	55
Congressional Testimony of William Webster	63
Declaration of Elizabeth A. Hacker	68
Declaration of Phyllis Bennis	72
Declaration of Marc Van Der Hout	74
Declaration of Ibrahim Abu-Lughod	77
Declaration of Khader M. Hamide	85
Declaration of Ernest Gustafson:	
Apr. 21, 1989	87
Feb. 2, 1995	93
Declaration of Karina Dimidjian (Nov. 11, 1994)	96
Excerpts from FBI Report on the PFLP, filed by Defendants as Exh. 45 to Frank Knight Declaration (filed Mar. 1, 1996)	130
FBI Memorandum on Julie Mungai	176
FBI Memorandum on Amjad Obeid	180
FBI Memorandum on Ayman Obeid	184
FBI Memorandum on Bashar Amer	190
Declaration of David Cole	207
Excerpts from Aug. 16, 1995 Transcript	211

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Docket No. CV87-2107

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL., APPELLEES

v.

JANET RENO, ET AL., APPELLANTS

SELECTED DISTRICT COURT
DOCKET ENTRIES

4/3/87	MR	1.	Complt. and Summs Case may be ref'd to Mag Kronenberg ofr dscvry.
* * * * *			
5-12-87	me	20.	FIRST AMEND COMPLT. pltfs
5-21-87	me	40.	ORD crt decided to dismiss action for combination of jurisdictional, standing, & jurisprudential concerns. (ENT 5-27-87)
* * * * *			
2-29-88	lj		LODGED cc of Ord frm 9th C/A petn for a writ of mandamus id DENIED. District Court lacks

jurisd to sondier a consitu-
tional challenge to the Orders
to show cause at issue in the
deporatation proceeding below.
8 U.S.C. § 1105a

* * * * *

6-15-88 fbr 53. 2nd A/C for declaratory & in-
junctive relief.

* * * * *

60. Note of motn & motn to dsms
for lack of jurisdictn & for fail-
ure to state a clm or for judg-
ment on the pldgs & in oppos to
motn for prelim injunct, retble
10-24-88. 1:30 pm. defts

* * * * *

11-15-88 dm 71. Hrg plths' motn for partial S/J
or in alt for P/I and defts' motn
to dsms for lack of jurisdetn &
for failure to state a clm or for
jdugment on the pldgs: Crt
finds plths' have standing, not-
withstanding prosecution &
will consider merits. Motn of
defts to dsms DENIED. Crt
will examine rights afforded
(illegal/deportable) aliens. Mat-
ter cont'd to 12-9-88 3 pm for
decision on merits. Any fur

argmts may be submttd by
letter. MO

* * * * *

12-22-88 dm 78. Hrg hld on plths motn S/J. Crt
renders decision on the merits.
Crt finds sect 901(b) Foreign
Relations Auth Act fivlates 5th
amd & is therefore unconstitu-
tional. (see doc for other specif-
ics) MO C/R-DB

* * * * *

1-26-89 dm Memo opinion & ORD that
aliens lawfully residing in the
United States are protected by
First Amendment & their
First Amd rights are not
limited by government's ple-
nary immigration. power. Ap-
plying established First Amd
principles, we fur hold that
McCarran-Walter provisions
are substantially overbroad in
contravention of the First Amd.
(ENT 1-26-89) Mld Note/Mld
cpys

* * * * *

9-6-89 mc 108. Ord re Selectve Prosecutn Clm
& 3rd Clm for Relief—It is ord
tht crt encls tht no jurispru-

dentl reasn exists to prvnt crt frm excersng frthwth its jurisdctn ovr pltfs slectve prosecutn clm. Crt frthr ords tht prtys submt brfs re dscvy on pltfs 3rd clm for releif on issues & accrdng to schdle discussd.

* * * * *

11-17-89 ms 130. Hearing held. Crt ords pltfs motn for partial S/J be granted-in-part & denied-in-part. Crt orders govern's motn to dsms denied as to the due process claim. Crt will allow pltfs to serve requests for interrogats & docs as to due process question upon Mr. Milhollan & Judge Hrycenko. Said interrogatories shall be focused & there shall not be more than 20 interrogatories upon each. If governm finds any of docs requested are for sensitive or privileged docs, governt shall submit said docs *in camera* to Crt for review. Crt orders parties may further brief issues of selective prosecution, due process, etc. as discussed. Crt will issue its own order shortly. M.O.

* * * * *

10/27/92 BP — ORD FROM 9TH CCA tht the appealed from jdugment of the said District crt in this cause be, & hereby is affirmed in appt, reversed in part, vacated & remanded.

* * * * *

11/19/93 BP 246. ORD Tht this crt therefore finds tht it lacks the jurisdiction to hear Hamide & Shehadeh's selective prosecution challenge & Hamide & Shehadeh's facial & as applied challenges to the deportation statute's provisions (ENT 11/22/93) mld cpys & notc.

1/7/94 248 ORDER The govt to produce to pla's by 2/11/94; any records of govt deportation actns during 1986 to 1993 for non-ideological, passive violations of the Immigration laws against any person the the govt knew was a member of any of these groups. This court hereby ORDS tht dft is preliminary enjoined frm conducting fur deportation proceedings against pla's. Please see lengthy doc in case fl for fur details by Judge Stephen V.

Wilson (ENT 1/11/94) mld cpys
& notc. (bp) [Entry date
01/11/94]

* * * * *

1/7/94

250 ORDER This court hereby
GRANTS pla's mot for a pre-
liminary injunction enjoining
the govt frm using classified in-
formation in considering & ad-
judicating the applications of
Barakat & Sharif unless the
govt provides Barakat & Sharif
with that information. The
court hereby ORDS the govt to
provide this discovery by
2/18/94. a mot for S/J should
focus on the need to develop a
factual record for the proce-
dural fairness of following con-
fidential information in IRCA
application proceedings. in gen-
eral & in the cases of Barakat
& Sharif in general. by Judge
Stephen V. Wilson (ENT
1/11/94) mld cpys & notc. (bp)
[Entry date 01/11/94]

3/7/94

251 NOTICE OF APPEAL by plain-
tiff Kader Mamide and Michael
Shehadeh to the 9th C/A frm
Dist. Court ord ent on 01/11/94.
(cc: David Cole: Michael P.
Linderman: Michael C. John-

son) Fees: Paid. Johnson (dmap)
[Entry date 03/10/94]

3/10/94

252 NOTICE OF APPEAL by de-
fendants, Janet Reno, Doris
Meissner, Harold Ezell, C.M.
McCullough, Ernest Gustafson,
Ricahrd K. Rogers and the
Immigration & Naturalization
Sevice to the 9th C/A from
Dist. Court ord ent 1/11/94 (cc:
ACLU Foundation of So. Calif,
Paul L. Hoffman, Esq.; David
Cole, Esq.; Marc Van Der
Hout, Esq.) Fee: Waived. (fvap)
[Entry date 03/16/94]

* * * * *

1/8/96

— LODGED cc 9th C/A ord jgm of
Dist Cet is AFFIRMED IM
PART, REVERSED AND RE-
MANDED IN PART. (app)
[Entry date 01/17/96]

2/27/96

363 MOTION by defendants to dis-
solve prelininary injunction
(we) [Entry date 03/04/96]

* * * * *

4/29/96

406 ORDER by Judge Stephen V.
Wilson denying dft's motion to
dissolve preliminary injunction
[363-1],, granting plf's motion

for preliminary injunction RE:
Hamide & Shehadeh [357-1]
(ENT 4/30/96) mld cpys/ntc
(mm) [Entry date 04/30/96]

* * * * *

5/24/96

412 NOTICE OF APPEAL by plain-
tiffs Aiad Barakat and Naim
Sharif to 9th C/A from Dist.
Court ord ent 3/25/96. (cc: Marc
Van Der Hout, Paul L. Hoff-
man, David Cole, Michael P.
Linderman, AUSA.) Fee: Paid.
(dl)

* * * * *

6/28/96

414 NOTICE OF PRELIMINARY
INJUNCTION APPEAL by
Janet Reno, AUSA to 9th C/A
from Dist. Court ord ent on
4/30/96. [414-1] (cc:Michael P.
Lindemann, AUSA: Paul L.
Hoffman: Marc Van Der Hout:
David Cole: Peter A. Schey:
Dan Storrmer: Kate Martin).
Fee: Waived. (app) [Entry date
07/01/96] [Edit date 07/01/96]

10/16/96

448 Notice of filing, NOTICE OF
MOTION AND MOTION by de-
fendant Immigration & Natz,
defendant Gilbert Reeves, de-
fendant Ernest R Gustafson,

defendant Harold Ezell, defen-
dant Alan Nelson, defendant
Edwin Meese to stay, to dis-
miss; motion hearing set 1:30
11/4/96 (tw) [Entry date
10/18/96]

* * * * *

2/7/97

482 ORDER by Judge Stephen V.
Wilson denying defts motion to
dismiss [448-2] (lc) [Entry date
02/10/97]

* * * * *

4/8/97

492 NOTICE OF PRELIMINARY
INJUNCTION APPEAL by de-
fendants Janet Reno, Doris
Meissner, Harold Ezell, C.M.
McCullough, Ernest Gustafson,
Richard K. Rogers, and the
Immigration and Naturaliza-
tion Service to 9th C/A from
Dist. Court Ord fld 2/7/97 [482-
1] (cc: AUSA; U.S. Department
of Justice, Washington, D.C.;
Van Der Hout & Brigagliano;
ACLU Foundation of Southern
California; Georgetown Uni-
versity Law Center) Fee:
Waived. (pjap) [Entry date
04/09/97]

* * * * *

1/9/98 507 CERTIFIED COPY of Appellate Court Order: #96-55929 affirming the decision of the District Court [414-1], 97-55479 affirming the decision of the District Court [492-1]. (ENT 1/16/98 (pbap) [Entry date 01/16/98]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Docket No. 96-55929

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL., PLAINTIFFS

AND

AIAD BARAKAT; NAIM SHARIF;
KHADER MUSA HAMIDE;
NUANGUGI JULIE MUNGAI;
AYMAN MUSTAFA OBEID; AMJAD OBEID;
MICHEL IBRAHIM SHEHADEH; BASHAR AMER,
PLAINTIFFS-APPELLEES

v.

JANET RENO, ATTORNEY GENERAL;
HAROLD EZELL; C.M. MCCULLOUGH,
DORIS MEISSNER, COMMISSIONER, INS;
ERNEST E. GUSTAFSON; PAST DISTRICT DIRECTOR, INS;
RICHARD K. ROGERS, DISTRICT DIRECTOR, INS;
GILBERT REEVES, OFFICER, INS IMMIGRATION
AND NATURALIZATION SERVICE,
DEFENDANTS-APPELLANTS

SELECTED COURT OF APPEALS
DOCKET ENTRIES

7/22/96 Filed appellees' motion to assign to prior panel; served on 7/17/96 (to MOATT) [3050339] (hh) [96-55929]

* * * * *

7/26/96 Filed defts/aplts Janet Reno, et al, response to motion to assign to prior panel; served on 7/23/98 (to MOATT) [96-55929] (hh) [96-55929]

* * * * *

8/19/96 Filed order MOATT (James R. BROWNING, Pamela A. RYMER,): Aples' motion to assign this appeal to the same panel that ruled on one of the prior appeals in this case . . . is GRANTED. Accordingly, the clerk of the court shall forward all appropriate filings to the panel that decided American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045 (9th Cir. 1995). The briefing schedule established prevsly shall remain in effect. The panel may set a date for oral argument or, pursuant to FRAP 34(a) and 9th Cir.R. 34-4, decide the appeal on the briefs without oral argument. [96-55929] (hh) [96-55929]

* * * * *

10/23/96 Filed Appellants Janet Reno, et al., motion to stay further briefing and consideration of the merits of this appeal for 60 days pending resolution by the dc of the govt's recent motion to dismiss the complaint in light of public law no. 104-208, which eliminates the dc's jurisdiction over this case;

exhibits; served on 10/22/96 (to PANEL) [96-55929] (hh) [96-55929]

* * * * *

11/1/96 Filed Appellees' opposition to aplts' motion to stay further briefing and consideration of the merits of the appeal; served on 10/31/96 (to PANEL) [96-55929] (hh) [96-55929]

* * * * *

11/20/96 Filed order (Dorothy W. NELSON, William C. CANBY, Jack E. Tanner,): Defts-aplts' motion to stay further briefing is DENIED. Defts-aplts are ordered to file a supplemental brief on the applicability of public law no. 104-208 to this case. The brief is due 21 days from the date of this order. Plntfs-aples are ordered to file a supplemental answering brief on this issue on or before the 21st day following the day on which defts-aplts submit their supp'l brf. Defts-aplts' request to file a reply brief on the merits of the underlying claims is GRANTED. The reply brief is due 14 days following the filing of this order. SO ORDERED. [96-55929] (hh) [96-55929]

* * * * *

4/28/97 Filed pltfs motion to consolidate cases 97-55479 & 96-55929 and assign it to previous

panel; served on 4/24/97 [3218797]
PREVPNL (em) [96-55929 97-55479]

* * * * *

5/1/97 Filed deft-Appellants' response to appellee's motion to consolidate cases and assigning it to previous panel, re: agreeing [3218797-1] served on 4/30/97 PANEL in 96-55929 [97-55479] (em) [97-55479]

* * * * *

5/28/97 Filed order (Dorothy W. NELSON, William C. CANBY, Jack E. Tanner,): Pltfs-aples motion to assign this appeal to prior panel and consolidate appeal with 96-55929 is granted. The pltfs-aples' mkotion to alter briefing schedule to dispense with additional briefing is granted. Pltfs-aples' request to file a supplemental reply briefing is denied. (parties phoned) (em) [96-55929 97-55479]

* * * * *

6/23/97 ARGUED AND SUBMITTED TO Dorothy W. NELSON, William C. CANBY, Jack E. Tanner [96-55929, 97-55479] (cv) [96-55929 97-55479]

* * * * *

7/10/97 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Af-

firmed; Written, Signed, Published. Dorothy W. NELSON, author; William C. CANBY; Jack E. Tanner.) FILED AND ENTERED JUDGMENT. [96-55929, 97-55479] (em) [96-55929 97-55479]

* * * * *

8/20/97 [3288209] Filed oriinal and 40 copies Appellant Janet Reno petition for rehearing with suggestion for rehearing en banc 18 p.pages, served on 8/9/97 (PANEL AND ALL ACTIVE JUDGES) (sm) [96-55929 97-55479]

* * * * *

12/23/97 Filed Published order (Dorothy W. NELSON, William C. CANBY, Jack E. Tanner,): The petition for rehearing is denied and the suggestion for rehearing en banc is rejected. (Published with dissent by Judge O'Scannlain with whom Judges Kozinski and Kleinfeld joined) in 96-55929, 97-55479 [96-55929, 97-55479] (em) [96-55929 97-55479]

* * * * *

2/11/98 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 97-1252 filed on 2/2/98. [96-55929, 97-55479] (em) [96-55929 97-55479]

* * * * *

6/8/98 Received notice from Supreme Court, petition for certiorari GRANTED on 6/1/98. Supreme Court No. 97-1252 (PANEL) (em) [96-55929 97-55479]

ATTORNEYS FOR PLAINTIFFS

(Attorneys Listed On Next Page)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civ. No. 87 02107
SRW (Kx)

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE;
ARAB-AMERICAN DEMOCRATIC FEDERATION;
ASSOCIATION OF ARAB AMERICAN
UNIVERSITY GRADUATES;
IRISH NATIONAL CAUCUS;
PALESTINE HUMAN RIGHTS CAMPAIGN;
AMERICAN FRIENDS SERVICE COMMITTEE;
LEAGUE OF UNITED LATIN AMERICAN CITIZENS;
MICHEL BOGOPOLSKY; DARREL MEYERS;
SOUTHERN CALIFORNIA INTERFAITH TASK FORCE
ON CENTRAL AMERICA;
AAD KHALED BARAKAT;
KHADER MUSA HAMIDE; JULIE NUANGUGI MUNGAI;
AMJAD MUSTAFA OBEID;
AMJAD MUSTAFA OBEID;
AYMAN MUSTAFA OBEID; NAIM NADIM SHARIF;
MICHEL IBRAHIM SHEHADEH; AND BASHAR AMER,
PLAINTIFFS

v.

EDWIN MEESE III, IN HIS CAPACITY AS
ATTORNEY GENERAL OF THE UNITED STATES;
ALAN C. NELSON, IN HIS CAPACITY AS COMMISSIONER
OF THE IMMIGRATION AND NATURALIZATION SERVICE;

HAROLD EZELL, PERSONALLY AND IN HIS CAPACITY AS
 DIRECTOR OF THE WESTERN REGION OF THE
 IMMIGRATION AND NATURALIZATION SERVICE
 ERNEST GUSTAFSON, PERSONALLY AND IN HIS
 CAPACITY AS DISTRICT DIRECTOR OF THE IMMIGRATION
 AND NATURALIZATION SERVICE;
 THE IMMIGRATION AND NATURALIZATION SERVICE,
 DEFENDANTS

Attorneys for Plaintiffs

PAUL L. HOFFMAN
 MARK D. ROSENBAUM
 JOHN HAGAR
 CAROL SOBEL
 PATRICIA ERICKSON
 ACLU Foundation of Southern California
 633 South Shatto Place
 Los Angeles, CA 90005
 (213) 487-1720

DAN STORMER
 National Lawyers Guild
 3550 Wilshire Boulevard
 Suite 1200
 Los Angeles, CA 90010
 (213) 386-4390

MARC VAN DER HOUT
 National Lawyers Guild
 3689 18th Street
 San Francisco, CA 94110
 (415) 626-4753

DAVID COLE
 MICHAEL RATNER
 Center for Constitutional Rights
 666 Broadway
 New York, NY 10012
 (212) 614-6464

WADE HENDERSON
 HOPE NAKAMURA
 American Civil Liberties Union
 122 Maryland Avenue, N.E.
 Washington, D.C. 20002
 (202) 544-1681

PETER SCHEY
 National Center for Immigrants Rights, Inc.
 256 South Occidental Boulevard
 Los Angeles, CA 90057
 (213) 388-8693

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I.

INTRODUCTION

1. This is an action for damages and for declaratory and injunctive relief challenging the use by the Immigration and Naturalization Service ("INS") of the provisions of the McCarran-Walter Act of 1952 ("The Act"), codified in 8 U.S.C. §1251(a)(6), to initiate investigations, arrests and deportation proceedings based upon activities clearly protected by the First and Fifth Amendments of the United States Constitution. It is under these provisions, specifically §§1251(a)(6)(D)(F)(G) and (H), that the INS in Los Angeles has arrested and sought to deport and still threatens to deport several plaintiffs in this action for allegedly belonging to an organization, the Popular Front for the Liberation of Palestine ("PFLP"), that allegedly distributes literature which "advocates" the doctrines of "world communism." The INS continues to charge plaintiffs Hamide and Shehedah under §§1251(a)(6)(F)(iii) for being affiliated with an organization—the PFLP—that "advocates" or "teaches" the "unlawful damage, injury or destruction of property."

Upon information and belief, it is pursuant to these provisions that the INS has participated in the preparation of a Contingency Plan ("The Plan") and pursued a policy which targets other aliens from Arab countries for similar treatment based on their constitutionally protected activities and associations. Because the challenged provisions of the McCarran-Walter Act punish aliens for their constitutionally-

protected activities, associations and beliefs, the use of §241(a)(6) of the Act in the recent Los Angeles deportation proceedings, as well as implementation of the INS plan and policy, have chilled political debate and discussion within the Arab community, in other ethnic communities and in the community at large. A declaration that the challenged provisions of the McCarran-Walter Act and the other practices and acts of the defendants challenged herein are unconstitutional on their face, and as applied in the Los Angeles deportation proceedings, and an injunction against the investigation, arrest, detention or deportation of aliens based upon §241(a)(6) of the Act is necessary to restore full First and Fifth Amendment rights to these threatened communities.

3. Since the first amended complaint was filed, this Court dismissed plaintiffs Hamide and Shehadeh's challenge to subsection (F)(iii), and the Court of Appeals denied plaintiffs Hamide and Shehadeh's request for an extraordinary writ. In December 1987, Congress effectively amended the McCarran-Walter with the passage of Section 901 of the Foreign Relations Authorization Act, but defendants have continued with the challenged deportation actions. Defendants have maintained that the Congressional provisions are inapplicable to persons, like the accused plaintiffs here, who the INS believes are associated with the PFLP. In addition, defendants have instituted unprecedented "summary exclusion" proceedings against a Palestinian permanent resident in Ohio, who they also assert is associated with the PFLP. Thus, the passage of time has only confirmed that defendants intend to use the challenged provisions against those who they assert are members of the PFLP.

4. Upon information and belief, although defendants have replaced the "ideological" charges with technical, non-ideological charges with respect to six of the accused plaintiffs, INS would not have arrested them at the outset nor continue to press for their deportation had they not been alleged to be members of an organization which defendants believe is grounds for deportation under Section 241(a)(6)(D)(F)(G) and (H). But for Section 241 (a)(6)(D)(F)(G) and (H), the accused plaintiffs would not be in deportation proceedings at all. The removal of the threat of investigation and deportation under the challenged provisions would alleviate the harms described by the plaintiffs herein.

II.

JURISDICTION

5. This Court has jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. §1329, 1331 and 1361 and the Declaratory Judgment Act, 28 U.S.C. §2201 *et seq.*, this being an action authorized by law to redress the deprivation under color of law, statute, ordinance, regulation, custom and usage of a right, privilege and immunity secured to plaintiffs by the First and Fifth Amendments to the United States Constitution.

6. Venue is proper under 28 U.S.C. §1391(e).

III.

PARTIES

A. Plaintiffs

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE

7. Plaintiff American-Arab Anti-Discrimination Committee ("ADC") is a not-for-profit corporation incorporated in the District of Columbia. The ADC has over 17,000 members and 61 local chapters throughout the United States. The ADC is a non-sectarian, non-partisan service organization committed to defending the rights and promoting the heritage of Arab Americans. The largest grassroots Arab-American organization in the United States, ADC was founded in 1980 by former United States Senator James Abourezk in response to stereotyping, defamation and discrimination directed against Americans of Arab descent. ADC serves its nationwide membership through direct advocacy in cases of defamation and stereotyping, and through legal action in cases of discrimination and immigration. ADC publishes information on issues of concern to Arab-Americans provides educational materials on Arab history and culture as well as the ethnic experience of Arabs in America. The ADC also sponsors summer internships in Washington for Arab college students, including non-citizen visa holders. Membership in the ADC is open to citizens, permanent residents and non-citizens and many ADC members are aliens. At least two of the defendants in the pending deportation proceedings are ADC members.

8. There are numerous members of the ADC who are citizens of other countries residing in the United States and who are subject to deportation under §§1251(a)(6) if they engage in activities deemed by the Government to fall within that statute. Many ADC members are of Palestinian origin and are actively engaged in discussion and debate about issues of concern to the Palestinian community around the world. Some ADC members engage in the kinds of

activities which appear to be the basis of the pending deportation proceedings in Los Angeles. Specifically, ADC members read and distribute a wide variety of literature relating to the Palestinian community and to Middle East issues generally. This literature includes *Al Hadaf*, *Democratic Palestinian* and similar magazines which may be perceived as "advocating" a "marxist" or "communist" line about Middle East issues. In general, many ADC members participate in debates, discussions and other events at which all points of view on Middle East issues are espoused and considered. ADC is a sponsor or participant of many public meetings at which such topics are discussed. Moreover, many ADC members make financial contributions to a wide variety of causes and organizations in support of Palestinians and their rights. These activities of ADC and its members have been chilled by the Los Angeles prosecution. Plaintiff ADC brings this action on behalf of itself and its members.

ARAB-AMERICAN DEMOCRATIC FEDERATION

9. Plaintiff Arab-American Democratic Federation ("Federation") is an association of Arab-American Democratic Party Clubs and Arab-Americans registered to vote as members of the Democratic Party. The Federation has members in clubs throughout the United States. The Federation's purpose is to create a bond between, and an opportunity for Arab-Americans who support Democratic Party goals and principles to work with the Democratic Party on a local, state and national level. The Federation was formed in May 1985. At present it has approximately 2,500 members. Arab-American Democratic Federation Clubs are located in the State of Rhode Island and the cities of Brooklyn, Washington, D.C., Los Angeles,

Detroit, Chicago, Houston, San Francisco, and parts of Western Pennsylvania. The Federation has many members and supporters who are not citizens. These members and supporters are subject to deportation under §1251(a)(6) if they engage in activities deemed by the Government to fall within that statute. The pending deportation proceedings in Los Angeles and the Contingency Plan have threatened the Federation's work because aliens who wish to be involved in the Federation's work are afraid that involvement in the political process may result in their deportation. Plaintiff Federation brings this action on behalf of itself and its members.

ASSOCIATION OF ARAB-AMERICAN UNIVERSITY GRADUATES

10. Plaintiff Association of Arab-American University Graduates ("AAUG") is a not-for-profit, tax-exempt educational and cultural organization dedicated to fostering better understanding between the Arab and American peoples, and promoting informed discussion of critical issues concerning the Arab world and the United States. The organization was founded in 1967. It is the oldest national Arab-American organization. AAUG members constitute the largest group of Arab-American scholars and professionals in North America. In addition to publishing books, papers and periodicals on Arab and Arab-American affairs, the Arab-Israeli conflict, and U.S. foreign policy, the AAUG organizes conferences and seminars on the Middle East and Arab-American issues, and an annual convention. AAUG has also convened special conferences in the Arab world including a 1979 conference held in Beirut on U.S. foreign policy; sponsored delegations to the Middle

East; provided speakers for public forums on that area of the world and the concerns of Arab-Americans; and utilized its members' professional skills to further socio-economic needs in the Arab world. AAUG members include American citizens of Arab-speaking descent, permanent residents and other non-citizens of Arab heritage, including a large membership of Arab students enrolled at colleges and universities in the United States. Many AAUG members are Palestinian and are actively engaged in activities relating to the Palestinian community in the United States and the Middle East. Some AAUG members engage in the kinds of activities which appears to be the basis for the pending deportation proceedings in Los Angeles. Specifically, AAUG members read and distribute literature, including *Al Hadaf Democratic Palestine* and similar magazines which may be perceived as having a "marxist" or "communist" line about Middle East issues. AAUG members also participate in a wide variety of demonstrations, public meetings and fundraisers which include supporters of the PFLP's positions on Middle East issues. These activities have been chilled by the pending deportation proceedings and the INS Plan and policy because alien members of AAUG may be the subject of deportation proceedings under § 241(a)(6) if they are perceived to be supporters of the PFLP or of a "marxist" "communist" line on Middle East issues. The chill caused by the Los Angeles proceedings and the INS Plan also make AAUG's program of activities much more difficult to implement because of the fear in the Arab community. Plaintiff AAUG brings this action on behalf of itself and its members.

IRISH NATIONAL CAUCUS

11. Plaintiff Irish National Caucus ("INC") is an Irish lobby in the United States headquartered on Capitol Hill in Washington, D.C. It is non-violent and has no foreign principal. The INC operates an educational foundation whose function is to explain problems in Ireland, including the problems of human rights violations and discrimination subsidized by the United States. For this reason, the INC sponsors speakers who have been labelled by the British Government as "terrorists," "marxist" or "communists" so that all views about the situation in Ireland will be available to the public in the United States. The speakers and participants in INC-sponsored programs have included permanent residents and other non-citizens of Irish descent in this country. The threat of prosecution and deportation under the McCarran-Walter Act, particularly in light of the recent proceedings initiated in Los Angeles, seriously threatens INC's ability to present all views on the Irish political and religious struggle and the opportunity of Irish Americans and others to hear these views.

PALESTINE HUMAN RIGHTS CAMPAIGN

12. Plaintiff Palestine Human Rights Campaign ("PHRC") is an organization concerned with furthering the Universal Declaration of Human Rights. PHRC is comprised of individuals from the religious, civil liberties, peace and academic organizations. Founded in 1977, it is a non-profit organization with 22 chapters throughout the United States and a number of affiliate groups. Many of the persons active in PHRC's work are non-citizens. The PHRC brings in

political and human rights activists from overseas for speaking tours in the United States. In addition, it holds conferences and seminars in this country and organizes fact-finding delegations to the Middle East. A newspaper is published bi-monthly, as well as special reports throughout the year. The PHRC also coordinates a Religious Taskforce and an Academic Network with total involvement of approximately 9,000 people. Permanent residents and other non-citizens regularly are invited to attend meetings and conferences sponsored by PHRC and are members of the Academic Network. The threat of prosecutions under the McCarran-Walter Act, particularly in light of the deportation proceedings pending in Los Angeles, impedes full discussion and debate at meetings and conferences sponsored by PHRC and has made and will make it more difficult for PHRC to include persons with every range of view on Middle East issues in its activities. This impact is felt both those working with PHRC in this country and those PHRC would like to invite to speak as expert witnesses.

THE AMERICAN FRIENDS SERVICE COMMITTEE

13. The American Friends Service Committee ("AFSC") is a not-for-profit corporation incorporated in the State of Pennsylvania. Since 1917 AFSC has been active in works of humanitarian relief and service, reconciliation among nations and peoples and programs to address discrimination, poverty and oppression. The AFSC carries on its work on behalf of the several branches of the Religious Society of Friends (Quakers) in the United States. AFSC work is carried out by a staff of over 400, guided by a national Board of Directors and a network of lay committees, through a National office in Philadelphia,

nine regional offices in the United States and through programs overseas.

14. The AFSC has long been involved in efforts to build a climate of peace in the Middle East. In 1948, the United Nations requested AFSC to organize the first relief service program for Palestinian refugees in the Gaza Strip. From this time forward, AFSC has been deeply involved in the issue of justice and peace in the Middle East, supporting humanitarian projects in Israel, the West Bank and Gaza Strip and the surrounding Arab states.

15. For many years the AFSC has developed and maintained an education program in the United States about Middle East issues with the goal of promoting public debate and support for a solution to the Middle East crisis acceptable to Israelis, Palestinians and other Arabs. As part of this program, AFSC organizes speaking engagements for Palestinians and Israelis living in the United States. AFSC also organizes conferences with speakers who are nationals from the Middle East who reside in the United States. The core of AFSC's Middle East work in the United States is to provide a platform for Middle East nationals living here and abroad so that there can be full debate and discussion of all viewpoints on Middle East issues.

16. The deportation proceedings pending against seven Palestinians and a Kenyan based on § 241(a)(6) of the McCarran-Walter Act have already had damaging effect on AFSC's ability to carry out its work. Recently, when an AFSC staff member issues invitations to three Palestinians to be part of the speaker's program, one individual refused, citing her unwillingness to speak publicly because of the deportation proceedings in Los Angeles. Two other persons said

they would postpone their decision until the outcome of the trial in Los Angeles was known and the INS Contingency Plan withdrawn. The other two persons said they could not speak publicly because of the risk of deportation.

17. The AFSC has a vital interest in this litigation. The pending deportation proceedings and the INS Plan have already had a chilling effect on the AFSC's constituents and its work. Moreover, the impact of the deportation proceedings and the INS Plan on the communities served by AFSC's Middle East Program has required AFSC to devote increased resources in support of its work in the Arab community. The removal of the threat of investigation and deportation under §241(a)(6) would alleviate the above-described harms suffered by AFSC and its constituents.

LEAGUE OF UNITED LATIN AMERICAN CITIZENS

18. Plaintiff League of United Latin American Citizens ("LULAC") is the oldest and largest membership organization in the United States for individuals of Latino descent. Founded in 1927 in Corpus Christi, Texas, LULAC has 100,000 members organized into over 400 active local councils throughout the United States and Puerto Rico. LULAC makes no distinction in membership between citizens and those holding permanent resident or other non-citizen status. No inquiries are made of membership as to their immigration status overall. Many members of LULAC are aliens. As part of its program, LULAC runs seminars and conferences on a state, regional and national level and also does advocacy work with various government agencies. Many of the new refugee members of LULAC want to speak out about

their recent experiences in Central America and elsewhere; however, the news reports of recent prosecutions of Palestinian immigrants in Los Angeles have heightened the existing fears in the Latino community throughout the U.S. about INS practices. Many of these refugees may espouse what the Government may perceive as a "marxist" or "communist" line concerning issues in Central American and Latin America. Many opposition groups and political organizations in countries in these regions are perceived by the U.S. Government as having a "marxist" or "communist" character. Thus, aliens from these regions, including LULAC members, are fearful of engaging in any activities which could be perceived as indicating "membership" or "affiliation" in groups which the Government may contend fall within §241(a)(6) of the Act. The recent deportation proceedings and the continuing threat of further investigations and deportation proceedings based on § 241(a)(6) of the Act has made and will continue to make LULAC's work with aliens more difficult by preventing them from discussing all aspects of the political situation in their homelands. Plaintiff LULAC brings this suit on behalf of itself and its members.

MICHEL BOGOPOLSKY

19. Plaintiff Michel Bogopolsky is a resident of the County of Los Angeles. Bogopolsky is a journalist who co-hosts a regular bi-weekly, one-hour radio show on KPFK entitled, "Middle East in Focus." The program concerns current events and political analysis of the situation in the Middle East and is broadcast on other Pacifica stations and picked up by satellite on radio stations across the country. During the past several years Bogopolsky has had

several of the accused plaintiffs and other local Arab activists on his program to present their viewpoints on the Middle East-issues. It is vital to the program to have all political viewpoints represented on the show, including the viewpoints of organizations which the U.S. Government might consider "marxist" or "communist" or "terrorist" in nature. Since the recent deportation proceedings commenced in Los Angeles, it has become impossible to have any alien on the show to espouse the political views of the PFLP or other groups which might be deemed to be covered by the amorphous provisions of § 241(a)(6) of the McCarran-Walter Act because of the risk of investigation and deportation. The fear engendered by these prosecutions have impeded Bogopolsky's work as a journalist and his ability to present all views on "Middle East in Focus."

REVEREND DARREL MEYERS

20. Plaintiff Reverend Darrel Meyers is a Presbyterian minister. He is Chair of the Social and Ecumenical Concerns Committee of the Presbyterian Synod of Southern California and Hawaii. He is Chair of the Middle East Fellowship ("Fellowship") of Southern California, an interfaith taskforce composed of people who have lived, worked or travelled frequently in the Middle East and who are committed to presenting a balance of information on, and a just peace in the conflicts in the Middle East. The Fellowship is composed of clergy, lay activists and academics, and includes Christians, Muslims, Jews and those with other or no religious affiliation. As part of this work, the Presbyterian Taskforce recently sponsored a four-day conference in San Francisco, attended by over 250 people, which featured

former hostage Ben Weir. Other speakers before the conference included former imprisoned Palestinians who spoke with great conviction of their cause. Throughout this work in the Fellowship and the Presbyterian Synod, Meyers ensures that discussion includes the full scope of groups in the occupied areas of Palestine. As a direct result of the prosecutions in Los Angeles under the McCarran-Walter Act, Meyers has experienced concern on behalf of many Arab-Americans and Arab immigrants about participation in such events. In addition to the general feeling of intimidation in the Palestinian community, Meyers has been impacted by the immediate sense that he cannot talk to people freely in this country about Middle East issues for fear that they might be detained or deported down the line because of forum discussions in which he is a participant.

SOUTHERN CALIFORNIA ECUMENICAL COUNCIL INTERFAITH TASKFORCE ON CENTRAL AMERICA

21. The Southern California Ecumenical Council Interfaith Taskforce on Central America ("SCITCA") is an organization of individuals and congregations which was created in 1980 as a response to the escalation of U.S. intervention in Central America and the consequent flow of refugees to the United States. SCITCA is composed of 330 congregations and individuals working to educate and mobilize Southern California are also included in the membership. Numerous aliens participate in SCITCA's work. SCITCA organizes forums, conferences, and delegations to members of Congress composed of clergy and laypersons, refugees from Central America, witnesses recently returned from

Central America, and academics who study the region. The pending deportation proceedings in Los Angeles under the McCarran-Walter Act threaten SCITCA's work in a dramatic way. The use by the INS of §241(a)(6) of the Act to silence and intimidate political debate, activity, and discussion in the Palestinian community establishes a dangerous precedent that can be used in the Central American community. This is particularly so because the U.S. Government has frequently referred to opposition groups and organizations in Central America as "marxists," "communists" or "terrorists." The recent proceedings make it impossible for aliens who wish to espouse the views associated with such groups to speak publicly because of the threat of deportation under the McCarran-Walter Act.

ACCUSED PLAINTIFFS

22. Plaintiffs Aiad Khaled Barakat, Khader Musa Hamide, Julie Nuangugi Mungai, Amjad Mustafa Obeid, Ayman Mustafa Obeid, Naim Nadim Sharif, Michel Ibrahim Shehadeh and Bashar Amer ("accused plaintiffs") are residents of the County of Los Angeles, except for Bashar Amer, who is a resident of the County of Riverside. Each of them has been charged by the INS with the violation of § 241(a)(6) of the McCarran-Walter Act, 8 U.S.C. 1251(a)(6) based on their alleged "membership" or "affiliation" with the Popular Front for the Liberation of Palestine ("PFLP"). Their alleged "membership" or "affiliation" with the PFLP is based on allegations that these plaintiffs distributed magazines published by the PFLP; supported the PFLP or its views in public meetings and demonstrations; raised money for the support of these activities and engaged in other acts

indicating support for the PFLP. None of these plaintiffs has been accused of committing *any* criminal act. The arrests and deportation proceedings have had a dramatic impact on the political activities and lives of the accused plaintiffs. These plaintiffs are unable to engage freely in speech or related activities because such activities might be used by the Government as evidence that they have violated §241(a)(6) of the Act. The accused plaintiffs' First Amendment rights have been frozen since January 1987, and will continue to be frozen until this Court grants the relief they are seeking. Based on this Court's previous orders and the decision of the Ninth Circuit plaintiffs Hamide and Shehadeh's claims under § 241(a)(6)(F)(iii) have been dismissed. Plaintiffs Hamide and Shehadeh continue to pursue their claims under §§ 241(a)(6)(D), (G) and (H). The remaining accused plaintiffs continue to pursue their claims under §§ 241(a)(6)(D)(F)(G) and (H).

DEFENDANTS

23. Defendant Edwin Meese III ("Meese") is the Attorney General of the United States and is charged with overall responsibility for the administration and enforcement of the Immigration and Nationality Act pursuant to 8 U.S.C. §1103. In that capacity and through his agents, he exercises the power to initiate investigations, arrests and deportation proceedings under §§ 1251(a)(6). Defendant Meese is sued only in his official capacity.

24. Defendant Alan C. Nelson ("Nelson") is the Commissioner of the Immigration and Naturalization Service ("INS") and as such is charged with the overall administration of the Act, his authority being delegated to him by defendant Meese pursuant to

8 U.S.C. § 1103(b) and 8 C.F.R. §§ 100.2(a) and 103.1. In that capacity and through his agents, he exercises the power to initiate investigations and deportation proceedings under 8 U.S.C. § 1251(a)(6). Defendant Nelson is sued only in his official capacity.

25. Defendant Harold Ezell ("Ezell") is the Director of the Western Region of the INS. In that capacity he is charged with the overall administration of the Act within the Western Region. In that capacity and through his agents Ezell was responsible for initiating investigations and deportation proceedings based upon 8 U.S.C. § 1251(a)(6) against the accused plaintiffs in Los Angeles in late 1986 and early 1987. Defendant Ezell is sued only in his official capacity.

26. Defendant Ernest Gustafson ("Gustafson") is the District Director of the Los Angeles District of the INS. In that capacity he is charged with the administration of the Act within the Los Angeles District. In that capacity and through his agents Gustafson was responsible for initiating investigations, arrests and deportation proceedings based on 8 U.S.C. § 1251(a)(6) against the accused plaintiffs in Los Angeles in late 1986 and early 1987. Defendant Gustafson is sued only in his official capacity.

27. Defendant Gilbert Reeves ("Reeves") is an official of the INS in the Los Angeles District office. As Acting Director, Reeves executed the original Orders to Show Cause which led to the arrest and detention of the accused plaintiffs pursuant to 8 U.S.C. § 1251(a)(6) of the Act. Reeves is sued only in his official capacity.

28. Defendant Immigration and Naturalization Service is the federal agency within the Department of Justice responsible for administering the Immigration and Nationality Act. Pursuant to that authority

INS implements 8 U.S.C. § 1251(a)(6) and the INS' employees arrested defendants and initiated deportation proceedings against the accused plaintiffs.

IV.

FACTS

A. The Act

29. Section 241(a)(6) of the McCarran-Walter Act authorizes the deportation of aliens residing within the United States for speech and associational activities clearly protected by the First Amendment. In particular, § 241(a)(6)(D) of the Act provides for the deportation of aliens who "advocate the economic, international, and governmental doctrines of world communism" or "members" or affiliates" of any organization that "advocates the economic, international, and governmental doctrines of world communism . . . either through its own utterances or through any written or printed publications issued or published by or with the permission or consent of or under the authority of such organization or paid for by the funds of or funds furnished by, such organization." Section 241(a)(6)(F)(iii) provides for the deportation of aliens who "advocate or teach or who are members of or affiliated with any organization that advocates or teaches . . . the unlawful damage, injury or destruction of property." No criminal acts either by the alien or the organization are required under the statute to justify the deportation of aliens, including aliens who are lawful permanent residents and have lived and worked in this country for many years.

B. The Plan

30. In May 1986, the Central Office of the INS promulgated a plan entitled "Alien Terrorists and Undesirables: A Contingency Plan" ("The Plan"). The Plan is a blueprint for the investigation, arrest, detention and deportation of aliens from Arab countries which the U.S. Government believes support terrorism. Pursuant to the Plan individuals targeted based on information received from other governmental agencies or intelligence sources are to be located, apprehended, detained and removed from the United States. The Plan reflects an underlying policy of the INS to target certain groups of aliens residing in the United States, particularly aliens from Arab countries, for deportation under the McCarran-Walter Act.

31. The Plan includes provision for a general registry of all non-immigrant aliens to target people for deportation. It also outlines use of proceedings pursuant to § 241(a)(6) of the Act and possible criminal prosecutions initiated under Titles 8 and 18 of the U.S. Code. Other agencies are required to provide the information necessary to support these actions to the INS. The Plan provides for the detention without bond of hundreds of persons from Arab countries pursuant to a general round-up of persons from countries thought to sponsor "terrorist" activities and expedited deportation proceedings in which deportation would be accomplished through the use of secret evidence not made available to the charged individuals or their counsel.

32. Also in 1986, as part of the Plan, the Alien Border Control Committee ("ABC") was formed. The Committee consists of representatives of several government agencies, included but not limited to, INS, FBI, CIA, Intelligence Unit of U.S. Customs, the

Counter-Terrorism and the Consular Affairs Sections of the Department of State, and various divisions of the Department of Justice, including Security, Criminal, Office of Legal Planning, Intelligence Policy and Review, Legislative and Intergovernmental Affairs and the Executive Office for Immigration Review ("EOIR")—the entity that oversees all immigration judges and of which every immigration judge is a party.

33. The first meeting of the ABC Committee was held at the Department of Justice on September 17, 1986. Four working groups were established. The EOIR was a part of Group III which had the assignment of "expulsion from the United States of alien activists not in conformity with their immigration status and expeditious deportation of aliens engaged in support of terrorism while protecting classified information and its sources." The Group, according to INS Assistant Commissioner Robert J. Walsh, was chaired by the INS General Counsel and had the participation of other Department of Justice divisions, as well as the FBI and the CIA.

C. Implementation

34. In January 1987, the INS initiated deportation proceedings against the accused plaintiffs based on alleged violations of § 241(a)(6) of the Act. The eight were originally alleged to be members of the PFLP, which was alleged to be an organization which disseminates or publishes materials advocating the economic or governmental doctrines of world communism. None of the eight was alleged to have committed any criminal acts or to have engaged in any acts of violence. Each of the eight was arrested and detained initially without bail. They were detained in a high

security prison under lockdown conditions. Upon information and belief, the arrest, detention and deportation proceedings initiated against the eight was undertaken pursuant to the above-described Plan and to an INS policy to target aliens from Arab countries under the McCarran-Walter Act.

35. The Los Angeles deportation proceedings are essentially based upon the alleged distribution of magazines which are publicly available at bookstores; fundraising events; participation in public speeches, meetings and demonstrations; and other activities upon which the INS bases its "affiliation" charge. All of these activities are protected by the First Amendment.

36. Deportation proceedings against the accused plaintiffs were commenced on February 17, 1987, continued to April 28, 1987, and again to May 8, 1987. In February and March 1987, unnamed Government sources within the FBI leaked substantial "confidential" information from the Government's files relating to the proceedings against the accused plaintiffs, including information relating to the Government's "case" against the accused plaintiffs. Upon information and belief, this material has been leaked in an attempt to put the Government's actions in a good light and to influence the outcome of the proceedings.

D. The Arrests

37. On or about January 26, 1987, using a combined total of between 150 and 200 agents of the INS, FBI and local police officers, seven of the eight accused plaintiffs were arrested at gunpoint in a series of pre-dawn raids on their homes. Plaintiffs Khader Musa Hamide and Julie Nuangugi Mungai were arrested at home in Glendale at approximately 7:00 a.m. when

three agents identifying themselves as INS pushed their way into the apartment. Despite defendants' request, no warrant was shown prior to entry and at no time that first day did any law enforcement official advise Hamide of his Miranda rights. Hamide responded to what he believed to be a subpoena to turn over all copies of *Al Hadaaf*, *Democratic Palestine* and *PFLP Bulletin* magazines in his home. Additional agents of the FBI, INS and local police were outside his home with weapons drawn. At several times during that first day, FBI agents questioned Hamide and threatened him with deportation if he did not cooperate. From the day of his arrest until his release on his own recognizance on February 17, 1987, Hamide was detained, first in San Diego, then at Terminal Island, in maximum security conditions, with limited visitation and restrictions on other activities. For the first day, he was held completely incommunicado from lawyers and family. After that time, he was taken to court or allowed visitation only when shackled hands to feet. Plaintiff Mungai was detained for three weeks at Sybil Brand Jail.

38. Plaintiff Aiad Khaled Barakat was arrested under similar circumstances when eight agents entered his home. The agent denied Barakat's request to call a lawyer. Agents confiscated a file with papers located in the kitchen and removed a briefcase with other papers from Barakat's car. Barakat was handcuffed and taken away in a car. When he asked during initial questioning who was arresting him, the agent responded, "Answer him, son of a bitch." The officers threatened him with deportation to Jordan and likely physical harm at the hands of the government. All requests by Barakat to call a lawyer during the first day's interrogations were denied. Not until the end of

the first day was Barakat advised of his *Miranda* rights. He was held in similar conditions to plaintiff Hamide until his release on \$500 bail on February 17, 1987.

39. Plaintiff Naim Nadim Sharif was arrested at gunpoint by at least ten agents at the home of his brother before his three-year old niece. Sharif was handcuffed and taken away in his pajamas, allowed to put on only a jacket and sneakers. The officers collected personal items from the plaintiff's room and other parts of the house. Sharif was interrogated in the car; however, no *Miranda* warning was given prior to the interrogation. He was held under the conditions described in paragraph 36 above until his release on \$2,000 bail.

40. Plaintiff Ayman Mustafa Obeid was arrested after six agents pushed their way into his apartment and pointed a gun at Obeid's head. He was immediately handcuffed while agents searched his apartment. Plaintiff's request for a search warrant was responded to by the agents with laughter; his request to call a lawyer was refused with the agent calling the plaintiff an "asshole." The plaintiff was placed in a car for a half hour while agents collected magazines from his apartment. At no time was the plaintiff advised of his *Miranda* rights while agents interrogated him in the car. Plaintiff Obeid was held until 7:00 p.m. that evening at the police station without access to food, water or cigarettes. He was transferred to Terminal Island, where he was held, under conditions described in paragraph 36 above, until his release on his own recognizance on February 17, 1987.

41. Plaintiff Bashar Amer was arrested at Chaffey College on or about February 12, 1987, while taking his chemistry exam. Agents entered the classroom

and removed him. He was taken handcuffed to maximum security at Terminal Island.

42. Plaintiff Amjad Mustafa Obeid was arrested at his apartment at approximately 7:00 a.m. When his wife answered a knock at the door, about agents pushed through into the apartment. Four agents entered the bedroom where plaintiff was sleeping, several with guns drawn, and ordered him to dress. The agents started to question his wife. The agents then entered the bedroom of Obeid's Greek roommate and started to question him and check his immigration papers. When asked for a warrant to search the house, the agents refused to respond. Plaintiff was presented with an arrest warrant and handcuffed. Plaintiff's request to be advised of his rights was met with rejection and ridicule. He was taken outside where the streets had been cordoned off with approximately four police cars filled with officers. There were a total of about fifteen officers involved in the arrest. The officers also entered a neighboring apartment occupied by people from Lebanon to check immigration papers. Plaintiff was transported to the Los Angeles County Jail, where he was handed over to immigration officials at approximately noon and taken to court for his first appearance. Following that, plaintiff was transferred to San Diego and held in maximum security conditions. He received no food or water until late that night. He was held in San Diego for 36 hours and then brought up to court on January 28, 1987. At the request of counsel, on January 28, 1987, plaintiff was transferred to Terminal Island, where he was held under conditions described in paragraph 36 above, until his release on his own recognizance on February 17, 1987.

43. Plaintiff Michel Ibrahim Shehadeh was at home alone with his three-year old son when agents entered his house at 7:00 a.m. on January 26, 1987. Approximately eight agents entered the house to arrest Shehadeh. The officers were going to leave the child alone in the apartment and denied plaintiff an opportunity to call for someone to stay with the child; however, a neighbor arrived before they left. There were several police cars outside the apartment building and approximately fifteen agents were involved in all in the arrests. Shehadeh was held under the conditions described above until his release on his own recognizance on February 17, 1987. His son has had nightmares since the arrest.

E. The Deportation Proceedings

44. From January 1987 to April 1987 all of the accused plaintiffs were charged under 8 U.S.C. § 1251(a)(6)(D)(G) and (H) of the Act. Plaintiff Mungai was originally charged only with being an overstay non-immigrant under §241(a)(2)(6) but the § 241(a)(6)(D)(G) and (H) charge was added on February 10, 1987. On or about April 23, 1987, defendants dropped the charges against six of the accused plaintiffs under these sections of the Act. Upon information and belief, defendants did so for tactical reasons only, and will refile charges under § 241(a)(6)(D)(F)(G) or (H) whenever they determine that it is tactically useful to do so. Defendants still maintain that all of the accused plaintiffs have affiliations with the PFLP which render them subject to deportation under the challenged provisions. Thus these six plaintiffs remain constantly at risk of the reinitiation of the charges under 8 U.S.C. § 1251(a)(6), and must restrict

their speech and associational activities as long as that threat remains.

45. On or about April 27, 1987, INS also dropped the charges under § 1251(a)(6)(D)(G) and (H) against the remaining accused plaintiffs, Hamide and Shehadeh. The INS then filed new charges under § 1251(a)(6)(F)(iii) against these plaintiffs based on their alleged affiliation with an organization, the PFLP, which allegedly "advocates" or "teaches" the "unlawful damage, injury or destruction of property."

46. On May 11, 1987, all charges against the accused plaintiffs were terminated by Immigration Judge Ingrid Hyrchenk because of defendants' refusal to produce defendant Reeves as a witness at a hearing to determine whether defendants' conduct in connection with the initiation and maintenance of the immigration proceedings violated the Fifth Amendment. On May 12, 1987, defendants refiled these same charges against the accused plaintiffs. These proceedings have been stayed pending the resolution of an appeal before the Board of Immigration Appeals. Defendants have never renounced the use of any provision in 8 U.S.C. §1251(a)(6) and continue to maintain the appropriateness of using these provisions against the accused plaintiffs and other aliens now and in the future.

47. On December 22, 1987, Congress enacted the Foreign Relations Authorization Act for Fiscal Years 1988 and 1989, Section 901 of which addresses ideological deportations and exclusions. The new law states that "[n]otwithstanding any other provision of law, no alien may be . . . subject to deportation because of any past, current, or expected beliefs, statements or associations which, if engaged in by a United States citizen in the United States, would be

protected under the Constitution of the United States." Section 901(a). However, Section 901(b) creates exceptions for aliens "who a consular official or the Attorney General knows or has reasonable ground to believe has engaged, in an individual capacity or as a member of an organization, in a terrorist activity or is likely to engage after entry in a terrorist activity" and for members of the Palestine Liberation Organization ("an alien who is described in section 21(c) of the State Department Basic Authorities Act of 1956"). The INS has maintained that both exceptions apply to persons alleged to be members of the PFLP.

48. On December 31, 1987, the INS instituted "summary exclusion" proceedings under the McCarran-Walter Act against Fouad Rafeedie, a permanent resident alien living in Ohio. The INS charges Rafeedie with being associated with the PFLP, and is seeking his exclusion and deportation under the parallel provision in the exclusion statutes to that invoked against Hamide and Shehadeh here. This expansion of the INS' actions against Palestinians charged solely with association with an unpopular Palestinian rights organization increases the chill felt by all plaintiffs in this action.

F. Chill

49. The above-described deportation proceedings, and the arrests, detentions, denials of bail and media campaign relating therein, have sent a chill through the Arab community throughout the United States, particularly the Palestinian community. The types of activities upon which the Los Angeles deportation proceedings have been based are speech and associational activities engaged in by a great many members

of the Arab community. Because the defendants seek in the pending procedures to establish "membership" or "affiliation" in the PFLP through evidence of speech-related activities no alien living in this country is safe to participate in a wide range of ordinary political or expressive activities or associations which might be viewed by the government as being of a "communist" or "terrorist" character. The use of this statute in the recent deportation proceedings has created an overwhelming sense of insecurity and uncertainty about the scope of First Amendment rights for aliens living in this country. This is particularly true for persons from countries or regions of the world in which opposition groups or organizations are viewed by the U.S. Government as being "marxist," "communist" or "terrorist" in character, and it is especially true for persons who support Palestinian rights. This insecurity and uncertainty has led inevitably to the suppression of plaintiffs' expressive and associational activity and has diminished public debate and discussion of crucial issues concerning the Middle East and other areas of the world. Defendants' actions have also suppressed all of the plaintiffs' rights to receive ideas and have thus abridged the exercise of their rights of speech, press and political freedom.

50. Plaintiffs will continue to suffer injury to their First and Fifth Amendment rights if the challenged activities are not enjoined. Defendants' actions are arbitrary, capricious and contrary to law. Plaintiffs have no adequate remedy at law. Only the relief requested will redress plaintiffs' injuries. The accused plaintiffs have attempted to raise their constitutional arguments in the pending deportation pro-

ceedings and have exhausted all available administrative remedies.

51. The chill felt by aliens supporting Palestinian rights is exacerbated by defendants' interpretation and application of Section 901 of the Foreign Relations Authorization Act. Under this Act, and under defendants' application thereof, all aliens are ensured that they cannot be deported for speech and associational activities that would be constitutionally protected for U.S. citizens, *except* those aliens whom the INS views as associated with the Palestine Liberation Organization or with organizations deemed "terrorist." Only those persons may still be deported for advocating world communism or the destruction of property. This singling out of aliens who support Palestinian rights increases the risk that such aliens will face deportation for their speech or associations.

V.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(ALL PLAINTIFFS)

51. Plaintiffs incorporate Paragraphs 1 through 50 herein as though set forth in full.

52. Section 241(a)(6), 8 U.S.C. § 1251(a)(6), on its face and as applied in the pending deportation proceedings in Los Angeles, violates the First and Fifth Amendments to the United States Constitution.

SECOND CLAIM FOR RELIEF

(ACCUSED PLAINTIFFS ONLY)

53. Plaintiffs incorporate paragraphs 1 through 50 herein as though set forth in full.

54. The accused plaintiffs have been selected for investigation, arrest, detention and initiation and maintenance of deportation proceedings on the basis of a bad faith prosecution involving governmental misconduct and based upon their country of origin and their exercise of First Amendment rights, all in violation of the First and Fifth Amendments to the United States Constitution. Defendants' investigation, arrest, detention and initiation and maintenance of deportation proceedings against the accused plaintiffs is a selective and vindictive prosecution of plaintiffs in violation of plaintiffs' First and Fifth Amendments.

THIRD CLAIM FOR RELIEF

(ACCUSED PLAINTIFFS ONLY)

55. Plaintiffs incorporate paragraphs 1 through 50 herein as though set forth in full.

56. Upon information and belief the Executive Office of Immigration Review participated in the creation of the INS Contingency Plan and in the policy of targeting aliens from Arab countries for deportation under the McCarran-Walter Act. Specifically, the EOIR participated in the Alien Border Control Committee and had responsibility to plan, along with other agencies, the "expeditious deportation of aliens engaged in support of terrorism while protecting classified information and its sources." The EOIR's participation in the creation of the Plan renders the EOIR and all immigration judges incapable of providing a fair and impartial hearing to the accused plaintiffs. The deportation proceedings pending against the accused plaintiffs in immigration court therefore violate the accused plaintiffs' rights to due process under the Fifth Amendment.

FOURTH CLAIM FOR RELIEF

58. Paragraphs incorporate paragraph 1 through paragraph 50 herein as though set forth in full.

59. Section 901(b) of the Foreign Relations Authorization Act, by singling out members, or suspected members, of the Palestine Liberation Organization for continued ideological deportation, violates the equal protection guarantee of the Fifth Amendment to the United States Constitution.

FIFTH CLAIM FOR RELIEF

60. Paragraphs incorporate paragraph 1 through paragraph 50 herein as though set forth in full.

61. Section 901(b) of the Foreign Relations Authorization Act by singling out members, or suspected members, of the Palestine Liberation Organization for ideological deportation constitutes a bill of attainder in violation of Article I, § 9, cl 3 of the United States Constitution.

VI.

RELIEF

WHEREFORE, plaintiffs request that this Court:

1. Declare that Section 241(a)(6)(D)(F)(G) and (H) of the McCarran-Walter Act of 1952, 8 U.S.C. § 1251(a)(6)(D)(F)(G) and (H), on its face violates the First and Fifth Amendments to the United States Constitution;

2. Declare that Section 241(a)(6)(D)(F)(G) and (H) of the McCarran-Walter Act, 8 U.S.C. § 1251(a)(6)(D)(F)(G) and (H), as applied in the pending deportation proceedings against the accused plaintiffs, violates the First and Fifth Amendments to the United States Constitution;

3. Declare that the accused plaintiffs have been subjected to selective, discriminatory, vindictive and bad faith investigation and prosecution in violation of the First and Fifth Amendments to the United States Constitution;

4. Declare that the exception for Palestine Liberation Organization members in Section 901 of the Foreign Relation Authorization Act on its face violates the First and Fifth Amendments to the United States Constitution.

5. Declare that the exception for Palestine Liberation Organization members in Section 901 of the Foreign Relations Authorization Act on its fact constitutes a Bill of Attainder in violation of Article I, § 9, cl 3 of the United States Constitution.

6. Enjoin defendants from investigating any person for alleged violations of Section 241(a)(6)(D)(F)(G) and (H) of the McCarran-Walter Act or initiating or maintaining any deportation proceedings against any person for alleged violations of these provisions of the Act;

7. Enjoin the deportation proceedings now pending against the accused plaintiffs;

8. Grant plaintiffs costs of suit and attorneys fees; and

///

///

///

///

///

///

///

///

///

///

///
///
///

9. Grant such other further relief as this Court
deems just and proper.

DATED: June 15, 1988

PAUL L. HOFFMAN
MARK D. ROSENBAUM
JOHN HAGAR
CAROL SOBEL
PATRICIA ERICKSON
ACLU FOUNDATION OF
SOUTHERN CALIFORNIA

DAN STORMER
NATIONAL LAWYERS
GUILD

MARC VAN DER HOUT
NATIONAL LAWYERS
GUILD

DAVID COLE
MICHAEL RATNER
CENTER FOR
CONSTITUTIONAL RIGHTS

WADE HENDERSON
HOPE NAKAMURA
AMERICAN CIVIL
LIBERTIES UNION

PETER SCHEY
NATIONAL CENTER
FOR IMMIGRANTS
RIGHTS, INC.

BY: PAUL L. HOFFMAN
PAUL L. HOFFMAN
Attorneys for
Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 87-02107
SVW (Kx)

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.
PLAINTIFFS

v.

JANET RENO, ET AL.,
DEFENDANTS

MOTION TO DISMISS

Defendants hereby move pursuant to Federal Rule
of Civil Procedure 12(b)(1) to dismiss the above-
captioned case for lack of subject matter jurisdiction,
for the reasons set forth in the accompanying Memo-
randum in Support.

Respectfully submitted,

PHILIP D. BARTZ
PHILIP D. BARTZ
Deputy Assistant Attorney
General

MICHAEL P. LINDEMANN
MICHAEL P. LINDEMANN
Assistant Director

MADLINE HENLEY
MADLINE HENLEY
Attorney

CHRISTOPHER C. FULLER
CHRISTOPHER C. FULLER
Attorney

Office of Immigration
Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
(202) 616-4900

Date: November 4, 1996

Time: 1:30 p.m.

Courtroom:

Hon. Stephen V. Wilson

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Case No. 87-02107
SVW (Kx)

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.
PLAINTIFFS

v.

JANET RENO, ET AL.,
DEFENDANTS

**DEFENDANT'S MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

FRANK W. HUNGER
Assistant Attorney General
PHILIP D. BARTZ
Deputy Assistant Attorney General
NORA MANELLA
United States Attorney
MICHAEL C. JOHNSON
Assistant United States Attorney
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-6880

ROBERT L. BOMBAUGH

Director

MICHAEL P. LINDEMANN

Assistant Director

EDWARD J. DUFFY

CHRISTOPHER C. FULLER

MADELINE HENLEY

VERNON B. MILES

Attorneys

Office of Immigration Litigation

Civil Division

U. S. Department of Justice

Post Office Box 878

Ben Franklin Station

Washington, D.C. 20044

(202) 616-4900

ATTORNEYS FOR DEFENDANTS

[Dated November 4, 1996]

On April 3, 1987, plaintiffs filed the above-captioned suit challenging the constitutionality of the Attorney General's efforts to deport them and seeking to stay administrative proceedings. On September 30, 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("the 1996 Act"). Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (Division C of Omnibus Consolidated Appropriations Act, 1997) (relevant provisions attached as Exhibit A). As explained below, the 1996 Act divested this Court of jurisdiction over this litigation effective September 30, 1996,¹ and plaintiffs' case must therefore be dismissed.

Section 306(a) of the 1996 Act amends section 242 of the Immigration and Nationality Act ("INA") by adding the following provision:

EXCLUSIVE JURISDICTION. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence

¹ The provisions of INA section 242(g), 8 U.S.C. § 1252(g) (as amended by the 1996 Act § 306(a)) and 306(c) of the 1996 Act became effective on September 30, 1996, when President Clinton signed the 1996 Act into law. See *United States v. Shaffer*, 789 F.2d 682, 686 (9th Cir. 1986) ("In the absence of an express provision in the statute itself, an act takes effect on the date of its enactment.") (citations omitted). See also *United States v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991), cert. denied, 504 U.S. 928 (1992); *United States v. King*, 948 F.2d 1227, 1228-29 (11th Cir. 1991), cert. denied, 503 U.S. 966 (1992); *Demars v. First Serv. Bank for Sav.*, 907 F.2d 1237, 1238-39 (1st Cir. 1990).

proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

INA § 242(g), 8 U.S.C. § 1252(g) (as amended). The instant action arises "from the decision or action by the Attorney General to commence [and] adjudicate proceedings" against the plaintiffs, and therefore falls squarely within the terms of the amended statute. In addition, section 306(c) of the 1996 Act makes clear that Congress intended amended section 242(g) to apply to pending cases. That section expressly states that the new section 242(g) is applicable "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." 1996 Act § 306(c). Thus, according to the plain language of section 242(g), this Court is divested of all of the claims that the plaintiffs have made in this case.

Where dismissal is sought based on statutory repeal of a court's jurisdiction, the first inquiry is "whether Congress has expressly prescribed the statute's proper reach." *Duldulao v. INS*, 90 F.3d 396, 398 (9th Cir. 1996) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, ___, 114 S. Ct. 1483, 1505 (1994)). "If so, [the court] simply appl[ies] the terms of the statute." *Id.* Here, Congress could not have been more explicit as to the "proper reach" of the new section 242(g). Congress plainly provided that section 242(g) should apply "without limitation to claims arising from all past, **pending**, or future exclusion, deportation, or removal proceedings under [the INA]." 1996 Act § 306(c) (emphasis added). Accordingly, this Court must apply the terms of section 242(g), and dismiss this case for lack of jurisdiction. *See id.*

Further, even if the Court were to somehow find that the language of the new statute is not clear with respect to its application to pending cases, the Ninth Circuit's analysis in *Duldulao* still controls and requires dismissal for lack of jurisdiction. The Ninth Circuit in *Duldulao* heard a challenge to a provision of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") that precludes the circuit courts from reviewing appeals from final orders of deportation entered against certain criminal aliens. *See* § 440(a) of the AEDPA, Pub. Law. No. 104-132, 110 Stat. 1214 (1996). The Court concluded that this provision is jurisdictional and, as such, it "takes away no substantive right but simply changes the tribunal that is to hear the case."² *Duldulao*, 90 F.3d 399 (quoting *Landgraf*, 511 U.S. at ___, 114 S. Ct. at 1501). Under these circumstances, the "presumption

² The Second, Third, Fifth, Sixth, and Eleventh circuits have also heard challenges to this provision of the AEDPA and, like the Ninth Circuit, have concluded that it ousts the courts of jurisdiction over all cases, brought by certain criminal aliens, including cases pending on the date of the AEDPA's enactment. *See Salazar-Haro v. INS*, ___ F.3d ___, NO. 96-3007, 1996 WL 518261 (3d Cir. Sept. 13, 1996); *Hincapie-Nieto v. INS*, 92 F.3d 27 (2d Cir. 1996); *Salmo v. INS*, No. 96-3404 (6th Cir. Aug. 5, 1996), *Qasguargis v. INS*, 91 F.3d 788 (6th Cir. 1996), *pet. for reh'g denied* (Aug. 21, 1996); *Mendez-Rosas v. INS*, 87 F.3d 672 (5th Cir. 1996) (per curiam) *Rolle v. INS*, No. 96-4560 (11th Cir. July 15, 1996). *See also Sanchez-Rodriguez v. INS*, No. 96-9518 (10th Cir. July 12, 1996) (holding that AEDPA provision divests court of jurisdiction over petition for review filed after AEDPA's effective date). *Compare Reyes-Hernandez v. INS*, 89 F.3d 490 (7th Cir. 1996), *pet. for reh'g denied* (Sept. 27, 1996) (finding that AEDPA provision does not divest court of jurisdiction where alien admitted deportability but may have had defense thereto).

against retroactive application of new legislation to pending cases . . . does not apply." *Id.* at 399 (quoting *In re Arrowhead Estates Dev. Co.*, 42 F.3d 1306, 1311 9th Cir. 1994)). Given this analysis, here it is plain that 242(g) is a jurisdictional statute affecting only the power of the Court to hear the case, and not the substantive rights of any party.³ As such, there is no presumption against application in this case. Moreover, as "[t]he Supreme Court has long held[,] . . . 'when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law.'" *Id.* at 399 (quoting *Bruner v. United States*, 343 U.S. 112, 116-17, 72 S. Ct. 581, 584 (1952)).

Even plaintiffs' counsel has recognized that the 1996 Act divests the courts of jurisdiction over cases of this kind. See David Cole, *Here's Something to Fear in Immigration Bill*, N.Y. Times, Sept. 27, 1996,

³ The 1996 Act does provide for judicial review of challenges to deportation proceedings—it simply prescribes the proper time and forum for those challenges. A statutory or constitutional challenge to a deportation proceeding will receive judicial review, but only *after* a final order of deportation has been entered, and then only by the United States circuit courts of appeals:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceedings brought to remove an alien from the United States under this title shall be available only in judicial review of a final order of deportation.

INA § 242(b)(9), 8 U.S.C. § 1252(b)(9) (as amended by § 306(a) of the 1996 Act). See generally *id.* §§ 242(a)(1), 242(b), 8 U.S.C. §§ 1252(a)(1), 1252(b) (placing jurisdiction to hear petitions for review of final orders of deportation exclusively with the courts of appeals).

at A32 (Exhibit B). Indeed, Mr. Cole has gone so far as to represent that section 242(g) "in fact bar[s] any court from hearing any challenge to decisions by the Immigration and Naturalization Service to commence and adjudicate proceedings." *Id.*

In short, Congress has explicitly provided that the courts do not have jurisdiction in cases of this kind, and, accordingly, this case must be dismissed.

CONCLUSION

For the reasons set forth above, the Court should dismiss this action in its entirety.

Respectfully submitted,

PHILIP D. BARTZ

PHILIP D. BARTZ

Deputy Assistant Attorney
General

MICHAEL P. LINDEMANN

MICHAEL P. LINDEMANN

Assistant Director

MADLINE HENLEY

MADLINE HENLEY

Attorney

CHRISTOPHER C. FULLER
CHRISTOPHER C. FULLER
Attorney

Office of Immigration
Litigation
Civil Division
U.S. Department of Justice
P.O. Box 878
Ben Franklin Station
Washington, D.C. 20044
(202) 616-4900

Date: Nov. 4, 1996
Time: 1:30 p.m.
Courtroom:
Hon. Stephen V. Wilson

Congressional Testimony of William Webster
S. Hrg. 100-276
NOMINATION OF WILLIAM H. WEBSTER

HEARINGS
BEFORE THE
SELECT COMMITTEE ON INTELLIGENCE
OF THE
UNITED STATES SENATE
ONE HUNDREDTH CONGRESS
FIRST SESSION
ON
NOMINATION OF WILLIAM H. WEBSTER,
TO BE DIRECTOR OF CENTRAL INTELLIGENCE

WEDNESDAY, APRIL 8; THURSDAY, APRIL 9;
THURSDAY, APRIL 30; AND FRIDAY, MAY 1, 1987

Printed for the use of the Select Committee on Intelligence

U.S. GOVERNMENT PRINTING OFFICE

75-691

WASHINGTON : 1987

For sale by the Superintendent of Documents to Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

* * * * *

[94] STATEMENT OF HON. ALAN CRANSTON,
A U.S. SENATOR FROM
THE STATE OF CALIFORNIA

Senator CRANSTON. Thank you, Mr. Chairman. I welcome you to this committee.

Judge WEBSTER. Thank you, Senator.

Senator CRANSTON. You come before us at a time of strain and stress for the Intelligence Community in the wake of the Iran/Contra matters. It is very important to have someone of experience and integrity and very good judgment assuming the role of leading the Intelligence Community. From all that I've gathered this far, you're highly qualified for this nomination, and subject to whatever may come up in the scope of these hearings, I expect you're going to be confirmed, and I will be one of those very happy to join in that confirmation.

I do want to ask you some questions that relate to something that happened in California a while ago. This hearing gives me the opportunity to do that. According to press reports the FBI started an investigation of the Popular Front for the Liberation of Palestine some three years ago. Some of my questions you may not want to answer in open session, some you may want to go back to look at the files, but let me ask you what prompted your investigation at that time of the PFLP?

Judge WEBSTER. Senator, I appreciate your understanding the constraints that I am under in responding to that question. The PFLP is a world-wide organization which has been extremely violent in its activities. It has claimed credit and been involved in

such incidents as the shootings in Munich and the hijacking of the famous plane that went to Entebbe. A number of Americans have been victims of the PFLP terrorist activity. There was a substantial basis under the Attorney General guidelines to conduct investigations of this organization and the individuals in that organization who might—who we had reason to believe might be engaged in terrorist activity. That was the basis for opening the investigation.

Senator CRANSTON. Did you have any reason to believe that the group was actually engaged in or planning to engage in terrorist activities in this country?

Judge WEBSTER. Taken as a whole, I think we had reason to believe that there were plans in operation of a terrorist nature. With all that is going on in the Middle East we have an awareness of infrastructures in the United States which could form the basis for support mechanisms if individual groups chose to retaliate or to engage in terrorist activities here in this country, and that goes across a number of such organizations. The individuals who were arrested in California had not been found to have engaged themselves in terrorist activity.

Senator CRANSTON. I understand that the Immigration Service actually carried out the arrest of the PFLP members for deportation purposes. But the arrests were based on information provided by the FBI concerning the organization and activities of the individuals, is that correct?

Judge WEBSTER. I believe that is correct, Senator.

[95] Senator CRANSTON. Press reports allege there was mistreatment of the arrested people by the

Immigration Service agents, not by the FBI agents. Were FBI agents present during the arrest?

Judge WEBSTER. FBI agents were present at the arrest for the purpose of being in a position to interview any of those arrested who wished to cooperate. We did not make the arrest.

Senator CRANSTON. Are you looking into the charges of mistreatment of the people during the arrest by the Immigration officials, or do you have any information on that?

Judge WEBSTER. Of course I have spoken to Mr. Allen Nelson, the head of the Immigration Service, and he has ordered an Office of Professional Responsibility investigation into the allegations. We had originally started a civil right investigation but were advised by the Department that we did not have a basis for that and that we should close our investigation and rely upon what should be developed by the Immigration and Naturalization Service, which was looking into it. We've also conducted some internal inquiries as a result of some of the news reports, particularly an article by Mr. Anthony Lewis, that referred to mistreatment of a woman. I think her name is Vitar; it's close to that, Vitar. We do not believe—we know that no agent of the FBI participated in it. We do not have any evidence of any others. Mr. Nelson is looking for any that he can find, and the attorney for the woman has not made her available for us to interview, so that we can do anything further about it. But if there is any way for us to put that to rest, I certainly want to do so.

Senator CRANSTON. What was the reason for the arrests being made for deportation purposes of the alleged members? Was that a technical, legal reason,

were they apprehended for deportation because they were "members of a Communist" organization.

Judge WEBSTER. Senator Cranston, I believe that some of them were out of status and that would be information, I believe, developed by the INS. But all of them were arrested because they are alleged to be members of a world-wide Communist organization, which under the McCarron Act, makes them eligible for deportation as foreign nationals.

Senator CRANSTON. So in a way, it was like arresting a gangster for parking by a fire hydrant? Do you think that we need to revise the laws that are available for this purpose? Are we using the wrong tools to address a legitimate concern about terrorism and terrorist operatives in the United States?

Judge WEBSTER. That's entirely up to Congress, because in this particular case if these individuals had been United States citizens, there would not have been a basis for their arrest.

Senator CRANSTON. Is there any law that would enable you to focus more narrowly on aliens who are actively involved in clandestine terrorist activities, rather than needing this broader law about membership in a Communist apparatus? In your opinion, would it be helpful to have a law that would be more precise?

Judge WEBSTER. I think it would be helpful to have a law that was more precise, and was treated as a more serious incident than just civil deportation.

Senator CRANSTON. Under what circumstances does the FBI conduct warrantless searches for intelligence purposes? Is the PFLP * * *

* * * * *

DECLARATION OF ELIZABETH A. HACKER

I, Elizabeth A. Hacker, declare:

1. I am currently employed as an immigration judge in the Executive Office of Immigration Review, U.S. Department of Justice, in Detroit, Michigan. I have held that position since July 1995. Prior to becoming an immigration judge, I had been District Counsel for the Immigration and Naturalization Service ("INS") in Detroit, Michigan. In November 1986, I was appointed District Counsel in Los Angeles, California. Prior to that appointment, I had been Acting District Counsel for several months. As District Counsel, I was the chief legal officer for the INS in the Los Angeles area.

2. In approximately the summer of 1986, INS Special Agent Arthur Gappert introduced me to FBI Special Agent Frank Knight. At that point in time, a naturalization application from plaintiff Khader Musa Hamide was pending before the INS. Special Agents Knight and Gappert advised me that Hamide was the subject of a counter terrorism investigation as a result of his activities on behalf of the Popular Front for the Liberation of Palestine (PFLP). They advised me that the investigation had found that Hamide was the leader of the PFLP in the Los Angeles area and had been involved in, *inter alia*, organizing fundraising events at which money was being raised to support terrorist activities, and distributing PFLP publications. Special Agent Knight informed me that an exclusion case involving the PFLP had been previously tried in the Los Angeles District of INS by the former district counsel, Michael Creppy. Special Agent Knight informed me that the PFLP had

been the subject of investigation by the FBI and INS in Los Angeles.

3. I met with Special Agents Knight and Gappert several times during 1986 concerning the details of their investigation. I advised Special Agent Knight that he should prepare a comprehensive report detailing the unclassified information on the activities of Hamide and the PFLP in the Los Angeles area.

4. Upon reviewing the details of the investigation, it was determined that several other aliens were actively involved with Hamide in PFLP activities in the Southern California area. Seven other individuals were determined to have been heavily involved in fundraising and other PFLP activities under Hamide. I concluded that these eight individuals had committed deportable offenses under the Immigration and Nationality Act. In addition, it appeared that several of the aliens had either failed to comply with the terms and conditions of their non-immigrant status or were otherwise out of lawful immigration status.

5. I made the tactical decision to have the initial Orders to Show Cause against plaintiffs include deportation charges under 8 U.S.C. § 1251(a)(6), which then mandated the deportation of aliens who were members or affiliates of organizations which published materials advocating world communism, as well as, the status charges. Although I was aware of additional evidence that would support other charges, I believed that the status charges and the charges under 8 U.S.C. § 1251(a)(6) would be established.

6. I took the foregoing actions pursuant to legislative mandates in the Immigration and Nationality Act and my responsibilities as INS District Counsel. I received no instructions, tacit or express, from any INS, FBI or Department of Justice Official to place

these plaintiffs in deportation proceedings, undertake enforcement actions targeting PFLP members, or to ignore similar immigration violations by aliens affiliated with the Nicaraguan Contras, Anti-Castro Cuban organizations, Afghan Mujahedin, RENAMO, or Vietnamese Montragnards. Moreover, I had no knowledge of the so-called "Contingency Plan" otherwise referred to in this litigation until that plan was mentioned by plaintiffs subsequent to the issuance of the orders to show cause. Nor was I aware of any investigation of any of the aforementioned groups or any individual aliens associated with such group or organization.

7. I have reviewed the February 2, 1995, Declaration of Ernest Gustafson that was previously filed in this matter. I have no knowledge of the pressures that he alleges therein to have been brought on INS Los Angeles by FBI officials with respect to plaintiffs. I do not recall any participation by Gustafson in the initial decision to place plaintiffs in deportation proceedings, as the initial orders to show cause were signed by the Acting District Director for Investigations, Gilbert Reeves. Moreover, Gustafson's assertion that routine immigration status violations were not then prosecuted in the Los Angeles office is incorrect. During that time that I was assigned to the Los Angeles District, it was not unusual for cases involving status violations or other "routine" violations to be prosecuted before the immigration court.

Pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the foregoing is true and correct.

/s/ ELIZABETH A. HACKER
ELIZABETH A. HACKER
United States Immigration
Judge

DECLARATION OF PHYLLIS BENNIS

I, Phyllis Bennis, declare as follows:

1. I am a private investigator licensed by the State of California. My license number is AQ-6532. I first received my license in August, 1976. I have been retained as an investigator by counsel for plaintiffs in this case.

2. On April 23, 1987, I attended a press conference by Immigration and Naturalization Services (INS) District Counsel William Odencrantz at the INS facility in Terminal Island. The press conference concerned the deportation proceedings against the accused plaintiffs in this case, and the INS's changes in the charges.

3. Mr. Odencrantz stated that the INS was seeking to deport all eight accused plaintiffs because "It is our belief that they are members of PLFP [sic], indeed meaningful members of the PFLP, subscribing to its tenets and beliefs. . . . That is true of all eight."

4. He stated further, "[Y]ou are all aware of the PLFP [sic]. You are all aware of the acts of violence which have been attributed, indeed accepted by the PLFP [sic] worldwide. And there is nothing that happens any place else that couldn't happen here. . . . The federal government of the United States regards them as threats, the PLFP [sic] and its members as being a potential danger to the welfare and well-being and public interest of the United States, and their removal from the United States is something we seek to achieve."

5. Mr. Odencrantz also explained that the decision to dismiss charges brought under the ideological exclusion provisions of the McCarran-Walter Act against six of the eight was a tactical decision

designed to expedite their removal from the country. He stated: ". . . Our changing of the charges was solely based upon tactical considerations as to how we can best, most efficiently, most economically and most quickly conclude the deportation proceedings with an order of deportability . . . the only concern we have is the ultimate result. . . . It is a question, for example, in a football analogy of you want a touchdown, but you don't care if you score it running or by passing."

I, Phyllis Bennis, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: October 16, 1989

/s/

PHYLLIS BENNIS*

Read and approved but not signed.
Signed copy will be filed shortly.

DECLARATION OF MARC VAN DER HOUT

I, Marc Van Der Hout, do hereby declare and state:

1. I am co-counsel for respondents *In the Matter of Hamide, et al.*, File Number A19 262 560, et al., currently pending before the Executive Office for Immigration Review, Los Angeles, California, and co-counsel for plaintiffs in this case.

2. Deportation hearings for some of the plaintiffs in this case have been conducted before the Executive Office for Immigration Review in Los Angeles. In at least two of the cases, the chief investigator for the Immigration and Naturalization Service, James Moser, testified that in the fall of 1986 he was asked by the Federal Bureau of Investigation to investigate the status of the plaintiffs in this case to see whether they were "amenable to deportation."

3. On May 3, 1989 in the case of Amjad Obeid, Investigator Moser testified that he was asked by the FBI in October 1986 to see whether Mr. Obeid was "amenable to deportation." The Federal Bureau of Investigation had previously investigated Mr. Obeid and concluded that he had committed no crimes in the United States.

4. Also in May, 1989 in the case of Bashar Amer, Investigator Moser testified that he was requested by "another agency" to see if Mr. Amer was "amenable" to deportation. The Federal Bureau of Investigation had also previously investigated Mr. Amer and concluded that he also had committed no crimes in the United States.

5. Later in the case of Mr. Amer, INS Investigator Lester Melville testified for the INS as an expert on student visas. Mr. Melville testified that he been employed by the Immigration and Naturalization

Service since approximately 1975 and had been a student visa expert in the Los Angeles area since 1983. On cross examination Mr. Melville testified that he reviewed the cases of students against whom the Immigration and Naturalization Service was considering whether to issue orders to show cause. He testified that in his entire history with the Immigration and Naturalization Service he was not aware of a single other case, besides Mr. Amer's, where the INS had instituted deportation proceedings against a student for taking too few credits.

6. Attached to this declaration are two declarations which were submitted to the Immigration Court in Los Angeles in May 1987 in the related deportation proceedings of the individual plaintiffs in this case. The declarations are of William Turner, former agent with the Criminal Investigation Unit and the Counter Espionage Unit of the FBI and Wayne Smith, a former Secretary of Political Affairs for the Department of State who also served as Director of Cuban Affairs and Chief of the U.S. Interests Section in Cuba. The declarations state that the United States government actively assisted aliens in this country from Cuba who advocated, and practiced, the unlawful destruction of property and assault on government officials and who were never subjected to deportation or exclusion by the United States government.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed this 9th day of November at San Francisco, California.

/s/ MARC VAN DER HOUT
 MARC VAN DER HOUT
 Declarant

DECLARATION OF IBRAHIM ABU-LUGHOD

I, Ibrahim Abu-Lughod, hereby declare the following:

1. I am a professor of Political Science at Northwestern University, Evanston, Illinois. I have written numerous books and articles and taught numerous classes relating to the politics of the Middle East, including Palestinian nationalism and the Palestine Liberation Organization. My book, *The Transformation of Palestine* (first published in 1971), is regarded as a seminal work on the political transformation of Palestine and its dismemberment in 1948. I have attached my curriculum vita.

2. I am a member of the Palestine National Council, the legislative, and highest branch, of the Palestinian state. I regularly attend meetings of the PNC that include representatives of all the constituent organizations of the PLO, including the Popular Front for the Liberation of Palestine (PFLP).

3. I am very familiar with the structure of the Palestine Liberation Organization (PLO), and with the Popular Front for the Liberation of Palestine, including their relationship to each other, and the array of organizations and institutions affiliated with both the PLO and the PFLP. The purpose of this declaration is to set forth the range of activities engaged in by the PFLP.

HEALTH INSTITUTIONS

4. The PFLP has a Social Welfare Department which includes a network of hospitals, clinics, ambulance services, and mobile clinics. These institutions serve Palestinians in refugee camps and in cities throughout the Arab world; their organizational

centers are in Damascus, Syria and Beirut, Lebanon. They serve Palestinians, whether or not they are members of the PFLP, as well as Lebanese, Syrians and other local residents for free or very low cost.

5. The PFLP provides scholarships and living expenses for many Palestinians to study at medical schools abroad, in countries in the Arab world, Latin America, the Soviet Union, Europe and elsewhere.

6. The PFLP provides full health and medical care for its own members; their families; the families of members killed or wounded; and the families of anyone killed or injured while engaged in actions under PFLP sponsorship.

CULTURAL ACTIVITIES

7. The PFLP runs a network of social clubs in refugee camps throughout Lebanon and Syria. They provide activities including music, sports, literacy programs, dances, and other programs for Palestinian residents of the camps, including PFLP members and non-members.

8. The Al-Ard music group is sponsored by the PFLP. It performs throughout the Arab world, including the Gulf states, Algeria, Lebanon, Syria and elsewhere, with a professional program of singing and dancing. It is financially and officially supported by the PFLP.

9. The Al-Ard group has trained numerous local music groups in refugee camps across the Arab world, who perform at local events.

10. The PFLP weekly Arabic magazine, Al-Hadaf, runs periodic contests with prizes based on cultural history, biographical information of leading cultural workers, etc.

11. The Ghassan Kanafani Cultural Foundation (Foundation) was initiated by the widow of Ghassan Kanafani, Annie Kanafani. Ghassan Kanafani was a noted short story writer and novelist, who carried out his cultural work as a member of the Politburo of the PFLP. He was the founder and chief editor of Al-Hadaf weekly magazine. All of Kanafani's writings, including his novels, poetry and children's stories, were produced under the sponsorship of the PFLP, and his salary was paid by the PFLP. His short stories and novels have been translated into a number of languages and are sold and distributed around the world, including in the U.S. The PFLP published much of his work. Kanafani was assassinated in Beirut in 1972.

12. Annie Kanafani began the Foundation at the suggestion of the leadership of the PFLP, and the organization continues to take responsibility for supporting the Foundation, including providing financial and political support.

13. Because Ghassan Kanafani wrote many of his books for and about children, the work of the Foundation is aimed at continuing his work by assisting Palestinian children. The Foundation is based in Beirut, and was one of the few Palestinian institutions to survive after the Israeli invasion of 1982. It runs several orphanages, children's centers and summer camps in Lebanon and elsewhere in the Arab world. Many of the children at the orphanages and children's centers are from Palestinian refugee camps whose parents have been killed. Numerous members of the PFLP are assigned to work in the orphanages and children's centers, and their salaries are paid by the PFLP. Funding for the Foundation comes from numerous charitable organizations in

Europe, the United States, and the Middle East, as well as from the PFLP itself.

14. The Information Department of the PFLP includes the Al-Hadaf Publishing House and the Art Department. The Publishing House publishes and distributes the weekly Arabic Al-Hadaf magazine, and the English monthly Democratic Palestine. Both are widely distributed in the U.S. For example, the Chicago Public Library's "The Palestinian/Israeli Conflict: A Select Bibliography" includes "Democratic Palestine, monthly magazine of the Popular Front for the Liberation of Palestine (PFLP), Damascus" as one of the "Periodical Sources . . . available in the periodical section of the Social Sciences and History Division."

15. Both Al-Hadaf and Democratic Palestine regularly include feature articles on Palestinian culture, art, poetry, etc. For example, Democratic Palestine (July 1987) includes (page 34) an article on "Poets of the Resistance," including poems from poets Samih Al-Qasem, Tawfig Zayyad, and Mahmoud Darwish. None of these poets is a member of the PFLP. In the previous issue (May 1987), there is a feature on the Arab cultural movement inside Israel. In June 1986, Democratic Palestine included a paper by Salem Jubran presented at a Greek cultural conference on "The Culture of Resistance"; Jubran is not a member of the PFLP, is a citizen of and lives in Israel. The April 1987 issue of Democratic Palestine includes a profile of Fathi Gaben, a Palestinian painter living in Jabalia refugee camp in the Gaza Strip. And Democratic Palestine of September 1988 features an article on "Songs of the Uprising," including some works by Israeli Jewish singers.

16. The Al-Hadaf Publishing House also publishes occasional books and pamphlets. For example, in 1979 it published *A History of the International Labor Movement*. In 1983, it published *Women in Palestinian Popular Culture*, by Abed Al-Zirai. That book went to a second printing in 1986.

17. The Art Department branch of the Information Department prints and distributes posters to Palestinians throughout the world. Some are commissioned to commemorate specific Palestinian holidays or nationalist events, while others reflect cultural themes. Posters are given to any interested Palestinians, whether members or non-members of the PFLP.

18. The PFLP also commissions paintings in cultural centers and elsewhere. The organization supports a number of its members to work as artists. Their paintings are displayed in exhibits sponsored by the PLO and the PFLP.

19. The periodicals of the PFLP consistently reflect a concern for and interest in making art widely accessible. A recent issue of Al-Hadaf (October 15, 1989) highlighted an exhibition honoring the anniversary of the killings of Palestinians in the Lebanese refugee camps of Sabra and Shatila in 1982. Another issue (October 1, 1989) spotlighted a Palestinian art exhibition in the Philippines, under official Filipino government patronage. It was held in the Philippines Foreign Ministry Hall, and was attended by the diplomatic corps and representatives of the Filipino leadership. The October 2, 1988 issue focused on Latin American artists whose posters include Palestinian themes.

EDUCATIONAL WORK

20. The PFLP runs a network of kindergartens and nurseries in refugee camps throughout the Arab world. One of them, for example, is called the Shadiah Abu Ghazaleh Day Care Center, located in Yarmouk refugee camp, outside of Damascus. These centers are under the responsibility of the Women's Section of the organization.

21. In Kuwait, the PFLP is part of a PLO consortium of full education institutions that provide basic education for Palestinian students from pre-school through high school levels.

22. The PFLP funds numerous students in advanced education. They are provided with scholarships and living expenses to study at colleges and universities throughout the world. These include members and non-members of the PFLP.

23. PFLP members and supporters are active in the Teachers Union and the General Union of Palestine Students, which has branches throughout the world. In those organizations, they support the broad-based work of the unions while reflecting their own political views as well.

DIPLOMATIC ACTIVITIES

24. The PFLP supports and is responsible to the broader diplomatic work of the PLO as a whole. For example, in 1986-87, the head of the Office of Palestinian Affairs in Lebanon, responsible for all activities involving the large Palestinian population in that country, was Salah Salah, a member of the Politburo of the PFLP.

25. In addition, the PFLP maintains its own diplomatic liason offices in a number of countries in the Middle East, Africa, Asia and Latin America.

ECONOMIC ACTIVITIES

26. The PFLP is a part of SAMED, a consortium of PLO economic institutions designed to further Palestinian economic self-sufficiency.

27. It also runs a network of women's workshops which teach women traditional embroidery, then help them to produce and market the product. It is aimed at women in the refugee camps, to provide them with basic skills to earn a living.

SOCIAL AND SOCIAL WELFARE ACTIVITIES

28. The Department of Martyrs is responsible for keeping records and caring for families of PFLP members and supporters killed or wounded. It provides monthly living stipends to the families, full health care, and full education costs for all children. This includes families of PFLP members or others killed in actions sponsored by the PFLP.

29. The Women's Department of the PFLP works as part of the General Union of Palestinian Women. It also has separate organizational existence, with projects in the refugee camps especially of Lebanon and Syria. Those projects include political and social development, literacy campaigns, and economic self-help projects.

30. The PFLP is active in the broader Palestinian trade union movement. Its members participate in the work of virtually all of the numerous separate trade unions, as well as the broader General Federation of Palestinian Trade Unions that involve all parts of the PLO.

PFLP AND THE PLO

31. The PFLP was founded in late 1967, following the Israeli occupation of the West Bank, Gaza and the Golan Heights. That war, and the resulting occupation, fundamentally changed the political landscape on which Palestinian nationalism was rooted.

32. The PFLP should not be confused with the Popular Front for the Liberation of Palestine, General Command. The latter is a distinct organization, not affiliated with the PFLP, and explicitly opposed to the PLO's renunciation of terrorism. The PFLP has accepted the PLO's renunciation of terrorism.

33. The specific development of the PFLP reflects one of the numerous alternative views that rose to contend with and simultaneously work with the more mainstream wing of the PLO, Fatah. Its development is linked to the earlier history of the Arab National Movement, and its origins reflect that nationalist orientation.

34. Like other sectors of the Palestinian nationalist movement, the PFLP from its beginning included political, diplomatic, cultural, economic and social activities in its strategic conception of how to regain Palestinian independence.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Evanston, Illinois, this day of November 1989.

/s/ IBRAHIM ABU-LUGHOD
IBRAHIM ABU-LUGHOD, PHD.

DECLARATION OF KHADER M. HAMIDE
(March 5, 1993)

DECLARATION OF KHADER M. HAMIDE

I, KHADER M. HAMIDE, do declare as follows:

1. I am a lawful permanent resident of the United States. I have personal knowledge of the within stated facts and if called to testify as a witness could and would competently do so.

2. I am a plaintiff in the above-captioned case. I and the other seven individual plaintiffs are also the targets of ongoing deportation proceedings.

3. Prior to the instigation of deportation proceedings against me in January 1987, I was actively involved in several Los Angeles-area associations, including the 1984 Rainbow Coalition for Rev. Jesse Jackson's presidential campaign; cultural and informational events sponsored by the Arab-American Anti-Discrimination Committee; and an Arab-American group working to secure Arab-Americans a voice in the electoral process. The other individual plaintiffs were also active in the Arab-American community, associating with groups that advocated for various political and social causes.

4. When we were arrested, we were charged with associating with the Popular Front for the Liberation of Palestine (PFLP), which the Immigration and Naturalization Service (INS) contended advocated the "doctrines of world communism." When we challenged the constitutionality of those charges, the INS substituted charges of associating with a group that advocates the "destruction of property" against Mr. Shehedah and me, and technical visa violations against the other six. Even then, an INS official

stated the reason the INS wanted to deport us was because of our alleged PFLP affiliations. Mr. Shehedah and I were subsequently charged with providing material support to an organization that has committed "terrorist acts."

5. The Government has admitted we are being prosecuted because of our alleged PFLP affiliations. For six years now, the threat of deportation based on the Government bias against us has made us afraid and unable to associate freely or speak freely on any topics that even remotely involve politics or economics, despite our belief that it is our constitutional right to do so.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of March, 1993, at Los Angeles, California.

/s/ KHADER M. HAMID
KHADER M. HAMID

DECLARATION OF ERNEST GUSTAFSON
(April 21, 1989)

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Civil No. 87-02107

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.,
PLAINTIFFS

v.

EDWIN MEESE, III, ET AL.,
DEFENDANTS.

JOHN R. BOLTON
Assistant Attorney General

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
CAROLYN M. REYNOLDS
GEORGE H. WU
Assistant United States Attorneys
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 688-6688

ROBERT L. BOMBAUGH

Director

LAURI STEVEN FILPPU

Deputy Director

MICHAEL P. LINDEMANN

JAMES A. HUNOLT

STEWART DEUTSCH

Attorneys

Office of Immigration Litigation

Civil Division

U.S. Department of Justice

Post Office Box 878

Ben Franklin Station

Washington, D.C. 20044

(202) 272-4364

Attorneys for Defendants

DECLARATION OF ERNEST GUSTAFSON

1. I am the District Director of the Los Angeles District Office of the United States Immigration and Naturalization Service. I have held this position continuously since September 6, 1993. Prior to assuming this position, I had previously served as District Director of the Phoenix District Office of INS from 1982 to 1983. In my position as district director, among other responsibilities, I am responsible, pursuant to 8 U.S.C. {1252(a) and 8 CFR { 242.1(a), for the decisions in the Los Angeles district office to issue orders to show cause against aliens who appear to be deportable under the deportation provisions of Section 241 of the Immigration and Nationality Act of 1952, 8 U.S.C. { 1251(a).

2. Pursuant to that responsibility, in May, 1987, I signed orders to show cause against the eight individual plaintiffs named in this lawsuit. I took this action based upon a review with my subordinates of the record evidence developed by INS investigators who were assigned to the eight cases.

3. In early 1984, I became aware that federal and local law enforcement authorities had formed a task force to discuss and plan security preparations for the Summer Olympic Games to be held in Los Angeles later that year. On behalf of the INS, a team of investigators was assigned by the assistant district director for investigations to sit on the task force. As the Olympics approached, these investigators manned desks at the Federal Bureau of Investigation's Los Angeles headquarters building. The INS investiga-

tors assisted the task force and FBI agents in particular in terrorism investigations and related matters.

4. One of the task force's initial objectives was to identify all known terrorist group which it concluded had the capability or inclination to commit a terrorist act at the Olympic Games against either participants or spectators. Thereafter, the task force assessed each terrorist group's effective presence and leadership in the United States and, in particular, in the Los Angeles area.

5. The task force identified the Popular Front for the Liberation of Palestine ("PFLP") as one of the designated terrorist groups. The task force additionally concluded that the PFLP had a substantial organization in the Los Angeles area, and should be targeted as constituting a potential threat.

6. Following the Olympics, the INS investigators ended their full time assignments to the FBI. They continued to assist the FBI in terrorism related matters, based on the INS's related enforcement jurisdiction.

7. Based on information developed by the task force and the FBI, in March 1985, one of the INS investigators opened an investigation on plaintiff Hamide.

8. In late January 1985, the investigator's review of plaintiff Hamide's files revealed that he had a pending naturalization petition. The processing of his naturalization petition was then halted in light of evidence that indicated that Hamide might be ineligible for naturalization.

9. In February 1985, my District Legal Counsel, INS central office officials, and FBI officials met in Washington to discuss the general possibility of

bringing deportation charges against alien members of terrorist groups.

10. In November 1985, the FBI requested that I assign two investigators to an continuing investigation of international terrorism in general. A further INS-FBI investigation of the PFLP and of plaintiff Hamide led the investigation team to the identification of the other seven named plaintiffs. Upon a review of the INS administrative records, the investigators concluded that each of the named plaintiffs were aliens, and that each was potentially deportable under various provisions of the Immigration and Nationality Act.

11. In September 1986, Hamide's attorney contacted the INS District Counsel to inquire about the status of Hamide's naturalization petition. One month later, the district counsel called Hamide's attorney to arrange an interview of Hamide.

12. Following the interview and because of the urgings of Hamide's attorney that INS continue to process the naturalization petition, INS staff attorneys began to consider deportation proceedings against Hamide and the other named plaintiffs.

13. In January 1987, the INS investigative staff drafted orders to show cause that were reviewed by the legal staff. An acting assistant district director for investigations signed these orders.

14. In May 1987, I reviewed superseding orders to show cause that were drafted by my staff attorneys, who explained that the January orders should be amended. To resolve any questions concerning the signature authority in this case, and since the deputy district director position and the assistant district director for investigations position were vacant on that date, I signed the superseding orders to show

cause based on a review of the pertinent files with my subordinates, and based on the aliens' apparent violations of the immigration laws that were revealed by that review.

15. At the time that I signed the May orders to show cause, I had neither seen nor had any knowledge whatsoever of the so-called "Alien Border Control Committee Contingency Plan." I still am not aware of the plan.

16. The investigation which resulted in the issuance of the orders was *not* initiated for the purpose of instituting deportation proceedings against any aliens. To the best of my knowledge, the task force was created for the sole purpose of protecting the public and this country's foreign guests at the 1984 Summer Olympics.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ ERNEST E. GUSTAFSON
ERNEST E. GUSTAFSON

Date: April 21, 1989

DECLARATION OF ERNEST GUSTAFSON
(February 2, 1995)

DECLARATION OF ERNEST GUSTAFSON

I, Ernest Gustafson, declare as follows:

1. I worked for the United States Immigration and Naturalization Service from 1962 to September 1989. I was the District Director of the Los Angeles District Office of the United States Immigration and Naturalization Service from September 1983 to September 1989, when I retired from the INS.

2. As District Director, in May 1987 I signed new orders to show cause against the eight individual plaintiffs in this lawsuit. (Previous orders to show cause, issued in January 1987, had been signed by acting assistant district director Gilbert Reeves, but the May 1987 orders superseded the initial orders to show cause.) From very early on in this case, it was clear that the case was not an ordinary immigration case, and the decisions as to whether to seek deportation and what to charge the plaintiffs with were apparently made in Washington by FBI and Justice Department officials.

3. Based upon my years of experience as an INS District Director and my involvement with this case, it is my opinion that the eight individual plaintiffs were singled out for deportation because of their alleged political affiliations with the Popular Front for the Liberation of Palestine. Had it not been for those affiliations, the INS and the FBI probably would not have sought to deport these individuals.

4. Two of the eight individual plaintiffs are permanent resident aliens, and there was no ground for their deportation other than their political affiliations

and activities. The other six individuals are not permanent residents, and in the May 1987 orders to show cause they were charged with taking too few credits as a student, working without authorization, and overstaying a visa. Because of other prosecutorial priorities and scarce resources, the Los Angeles INS office generally did not seek to investigate or deport aliens with such violations unless there was some further reason for doing so. In fact, I cannot recall a single other instance during my tenure in which our office issued an order to show cause for taking too few credits as a student. In this case, the reason our office devoted such resources and took such steps to deport these individuals is because of their alleged affiliation with the PFLP. In doing so, we were acting at the behest of the FBI, which concluded after investigating plaintiffs that it had no basis for prosecuting plaintiffs criminally, and urged the INS to seek their deportation.

5. One indication of the strained relations between the FBI and the INS regarding this case is an incident from September 1987, in which the FBI sent, with no clear authority, eight agents to my office with the goal of removing from my office safe the files in this case. I objected to this action as improper, and refused to allow the FBI agents to enter. In fact, I had already returned the files to Washington, because the case was being prosecuted by Washington attorneys.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Date: February 2, 1995

/s/ ERNEST GUSTAFSON
ERNEST GUSTAFSON

DECLARATION OF KARINA DIMIDJIAN
(November 11, 1994)

DECLARATION OF KARINA DIMIDJIAN

I, Karina Dimidjian, declare as follows:

1. I am a second-year law student at the Georgetown University Law Center in Washington, D.C. I am working as a research assistant for David Cole, and am assisting him in *American-Arab Anti-Discrimination v. Reno*.

2. I supervised the analysis of the asylum files, which was conducted by myself and several other law students. I first analyzed the allegations made in the asylum applications to determine whether the alien fell within the Court's definition of the control group as aliens who have "committed passive, nonideological violations of the immigration laws and with regard to whom the government was aware of their support of or affiliation with terrorist groups within the control group." Jan. 11, 1994 Order Regarding Discovery in Selection Prosecution Claim and Granting Injunction Against Further Deposition Proceedings at 9. I included in the control group any alien who claimed to be a member or material supporter of any of the relevant terrorist groups.

3. According to my analysis, the INS disclosed 227 files, of which only 65 files involved aliens who fulfill the criteria for membership in the control group. As noted in Appendix 1, all the files involved either Nicaraguans or Afghanastanis.

4. Of the remaining 163 aliens, 103 of them do not fit into the control group because they applied merely as family members of the principal applicant and have made no additional allegations about their own activities independent of their relatives. These files

were attached to the principal applicant's file in the original INS files, and were presumably included in the disclosure for that reason. Where a family member offered independent allegations concerning his or her activities, I treated the file as an independent file. Appendix 1 attached hereto identifies by immigration file number those files which contain independent allegations, and those files which were merely included because they concerned family members applying as relatives.

5. The remaining 59 aliens are not classified as members of the control group because they did not claim to be members or material supporters of either the Contras or the Mujahedin. Rather, these 59 aliens based their request for asylum upon various different reasons, including having a family member who was a Contra or Mujahedin, having past affiliations with the Somoza regime or the Nationalist Liberal Party, belonging to a religious organization such as the Jehovah's Witnesses or the Apostolic Church in Faith of Christ, belonging to a private sector organization such as Nicaraguan Free Enterprise (FUNDE), having political views which contradicted the ruling government's views, or a combination of these reasons. In Appendix 2, I have briefly indicated why the allegations of these 59 aliens do not satisfy the control group criterion.

6. Of the 65 aliens who are classified as members of the control group, the INS issued orders to show cause against only six. The INS found not credible two of these six aliens' claims of membership in a terrorist organization. The INS declares, in its Notice of Intent to Deny, that A23 729 725's claim of membership in an anti-communist group is not credible. In addition, the INS declares in its December 17,

1992 letter denying asylum that A28 681 594's testimony is not credible.

7. Of the other four, the INS issued the order to show cause for A27 520 940 on February 14, 1994, for A12 918 435 on May 2, 1994, for A28 739 465 on March 28, 1994 and for A28 821 745 on July 23, 1993.

8. Of the remaining 59 members of the control group, the INS granted asylum to 4, denied asylum to 6 without issuing an order to show cause, terminated 3 applications for the alien's failure to proceed with them, and stopped processing 45 without issuing a final denial of asylum or an order to show cause. One application was withdrawn.

9. Of the 45 applications which were stopped in process, one was last acted upon in 1987, 2 in 1988, 17 in 1989, 19, in 1990, 3 in 1991 and 3 in 1993. In Appendix 3, I have summarized the information in paragraphs 6-9 and have included a brief analysis of each file in the control group by immigration file number and category of treatment.

10. None of the files disclosed involved aliens who had entered the country before 1982.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

/s/ KARINA DIMIDJIAN
KARINA DIMIDJIAN

Date: 11/11/94

APPENDIX 1 TO DIMIDJIAN DECLARATION

APPENDIX ONE

The files in this Appendix are categorized by the nationality of the alien as well as by whether the alien satisfies the criterion of the control group. The files which are listed with a letter and a number are the principal files in which the alien presented independent allegations concerning his or her activities. The files listed with only a number are the secondary family applications which do not include any new information or independent allegations but rather depend solely on the individual's familial relationship to the principal asylum applicant.

Nicaraguans: 222

1. Control Group: 119

A.	1.	A27 920 642
	2.	A27 920 643
	3.	A27 920 644
	4.	A27 920 645
B.	5.	A28 821 745
	6.	A28 821 735
C.	7.	A28 342 127
D.	8.	A28 560 456
E.	9.	A28 565 839
F.	10.	A28 633 322
G.	11.	A28 821 729
H.	12.	A23 727 457
	13.	A23 727 459
	14.	A23 727 461
I.	15.	A28 630 548
J.	16.	A28 653 304

K.	17.	A28 306 080
	18.	A27 634 699
	19.	A27 633 150
	20.	A28 306 082
	21.	A28 306 083
L.	22.	A12 918 435
	23.	A28 713 242
	24.	A28 713 244
M.	25.	A23 729 725
	26.	A23 729 727
N.	27.	A28 739 465
	28.	A28 739 466
	29.	A28 739 467
	30.	A28 739 468
	31.	A28 681 594
O.	32.	A27 636 004
P.	33.	A28 685 839
Q.	34.	A28 680 406
	35.	A28 679 722
	36.	(not listed on original)
	37.	A27 962 033
	38.	A27 962 034
S.	39.	T28 319 653
	40.	A27 723 985
	41.	A27 651 752
	42.	A27 651 751
T.	43.	A26 677 081
	44.	A26 677 082
	45.	A26 602 357
U.	46.	A26 049 753
V.	47.	A28 874 664
	48.	A29 585 938
	49.	A29 585 940
	50.	A29 585 941
	51.	A29 585 942

	52.	A29 585 943
	53.	A28 868 789
W.	54.	A28 625 752
X.	55.	A28 653 688
Y.	56.	A28 670 979
Z.	57.	A28 675 932
	58.	A29 343 731
	59.	A28 676 015
AA.	60.	A28 679 742
BB.	61.	A28 565 655
CC.	62.	A28 565 749
	63.	A28 565 755
	64.	A28 565 752
	65.	A28 565 754
	66.	A28 565 750
DD.	67.	A28 565 753
	68.	A28 557 775
	69.	A28 557 776
EE.	70.	A28 850 176
FF.	71.	A28 742 043
GG.	72.	A26 070 382
HH.	73.	A26 044 948
	74.	A26 044 956
	75.	A28 650 143
JJ.	76.	A28 625 560
KK.	77.	A28 625 563
	78.	A28 666 511
LL.	79.	A28 667 022
MM.	80.	A28 675 788
NN.	81.	A28 688 484
	82.	A28 688 485
	83.	A28 688 486
	84.	A28 688 487
OO.	85.	A28 950 597
PP.	86.	A28 953 646

RR.	87.	A28 687 588
SS.	88.	A23 727 037
	89.	A23 727 039
	90.	A23 728 290
	91.	A23 728 292
TT.	92.	A28 558 171
UU.	93.	A28 565 631
VV.	94.	A28 291 282
WW.	95.	A27 719 134
XX.	96.	A28 679 418
YY.	97.	A28 687 752
	98.	A28 687 753
	99.	A28 687 754
	100.	A28 687 755
ZZ.	101.	A28 866 363
AAA.	102.	A28 643 381
	103.	A28 566 014
	104.	A28 566 016
	105.	A28 556 015
BBB.	106.	A28 687 889
	107.	A28 687 890
	108.	A28 687 837
CCC.	109.	A28 688 614
DDD.	110.	A28 634 360
EEE.	111.	A28 649 327
	112.	A28 649 326
FFF.	113.	A28 564 579
	114.	A28 564 580
	115.	A28 564 581
GGG.	116.	A28 643 385
HHH.	117.	A26 671 833
III.	118.	A28 687 848
	119.	A28 687 849

2. Non-Control Group.: 103

A.	1.	A28 342 126
B.	2.	A28 344 059
C.	3.	A28 344 062
D.	4.	A28 344 065
E.	5.	A28 565 575
F.	6.	A28 344 067
G.	7.	A28 311 931
	8.	A28 311 932
H.	9.	A28 548 597
	10.	A28 548 596
	11.	A28 548 599
	12.	A28 548 598
I.	13.	A28 565 776
J.	14.	A28 865 570
	15.	A28 865 571
K.	16.	A28 565 924
L.	17.	A23 728 356
M.	18.	A27 234 199
N.	19.	A28 785 033
	20.	A28 785 034
	21.	A28 785 035
	22.	A28 785 036
	23.	A28 787 034
	24.	A28 785 038
O.	25.	A28 632 840
P.	26.	A28 644 922
	27.	A27 962 936
	28.	A27 962 937
	29.	A27 962 938
Q.	30.	A29 592 271
	31.	A29 592 272
	32.	A29 964 093
R.	33.	A28 344 061
	34.	A28 344 060

S.	35.	A28 344 077
T.	36.	A72 515 238
U.	37.	A72 515 239
V.	38.	A26 045 369
W.	39.	A28 676 515
X.	40.	A28 676 522
Y.	41.	A26 270 189
Z.	42.	A27 540 470
AA.	43.	A27 540 471
BB.	44.	A28 733 468
	45.	A28 813 101
	46.	A72 514 362
	47.	A72 514 361
	48.	A72 514 363
CC.	49.	A28 784 466
DD.	50.	A28 874 572
	51.	A28 874 573
EE.	52.	A28 877 041
	53.	A27 723 985
FF.	54.	A28 351 312
GG.	55.	A28 635 086
	56.	A29 594 478
	57.	A29 594 479
HH.	58.	A28 666 673
	59.	A28 666 674
	60.	A28 688 573
	61.	A28 687 951
	62.	A28 688 574
	63.	A28 688 575
II.	64.	A28 667 185
JJ.	65.	A28 669 653
	66.	A28 669 657
	67.	A28 669 655
	68.	A28 669 658
	69.	A28 669 654

KK.	70.	A28 670 368
	71.	A28 670 370
	72.	A28 670 371
OO.	73.	A28 635 000
	74.	A28 635 001
PP.	75.	T27 540 469
QQ.	76.	A28 560 645
RR.	77.	A28 560 368
SS.	78.	A28 565 525
TT.	79.	A28 549 478
UU.	80.	A27 719 133
VV.	81.	A28 549 378
WW.	82.	A28 549 480
XX.	83.	A28 650 144
	84.	A28 669 913
YY.	85.	A28 646 040
	86.	A28 670 903
ZZ.	87.	A28 646 900
	88.	A28 856 775
AAA.	89.	A28 625 491
BBB.	90.	A28 667 188
CCC.	91.	A27 963 378
	92.	A27 963 379
	93.	A27 963 380
	94.	A27 540 414
DDD.	95.	A28 557 728
EEE.	96.	A28 687 303
	97.	A28 687 304
	98.	A28 687 305
FFF.	99.	A28 549 721
GGG.	100.	A28 351 313
HHH.	101.	A28 565 746
III.	102.	A26 297 254
	103.	A26 297 252

Cubans: 0

Afghanistanis: 5

1. Control Group: 4

- A. 1. A28 824 763
- B. 2. A27 520 949
- C. 3. A28 441 643
- D. 4. A27 520 876

2. Non-Control Group: 1

- A. 1. A28 441 646

APPENDIX 2 TO DIMIDJIAN DECLARATION

APPENDIX TWO: ANALYSIS OF REASONS ALIEN
FILES ARE NOT INCLUDED IN
THE CONTROL GROUP

- A. Aliens whose only claim for asylum rested upon fact that their family members were either members or provided material support to the Contras
1. A28 311 931 (attached application, A28 311 932)
: father was a member of the Nicaraguan Democratic Movement
 2. A28 577 728
: applicant's uncle was a Contra
 3. A23 728 356
: request for asylum alleges her mother was accused of helping the Contras
 4. A28 865 570 (attached application, A28 865 571)
: husband tried to defect from Sandinistas and was killed
: cousin was a pilot for the FDN
 5. A28 625 491
: cousin was a member of national guard who fought with the contras
: refused to join Sandinista Youth
 6. A28 667 188
: cousin is a Contra and was a Sandinista prisoner at time of filing request for asylum

7. A28 549 721
: claims to have ties with Palacio family who are Contras
: she worked as their housekeeper and accompanied them to the US in 1983 and 1984 not as a housekeeper but as a friend
8. A28 560 645
: stepfather was a Contra
9. A28 646 040 (attached application, A28 676 903)
: applicant's brother was accused of being a Contra
: refused to join Sandinista Farmer Syndicate
10. A28 549 478
: son was a contra fighter in Costa Rica and former member of the military during the Somoza government
11. A27 719 133
: wife of man who claims to be a member of the Nicaraguan Resistance
12. A28 877 041 (attached application, A27 723 985)
: father was head of Nicaraguan Central Workers (Central de Trabajadores de Nicaragua)
13. A28 635 086 (attached applications, A29 594 478, 479)
: refused to join Sandinista group

: husband worked undercover with the
Contras

14. A28 635 000 (attached application, A28 635 001)
: brother fights with Contras
: alien refused to join any Sandinista Organizations

15. A26 297 254 (attached application, A26 297 252)
: husband was a member of Fdn and is currently in prison for participating in counterrevolutionary activities

16. A28 315 313
: alien's nephew was a major with the Somoza Regime and fought with the Contras
: nephew's plane was shot down while fighting for Contra cause and he is now prisoner of Sandinista regime

B. Aliens whose only claim for asylum was based on membership or affiliation with the National Liberal party or the Somoza regime

1. A28 565 776
: alien was a part of the Somoza Regime
2. A28 344 067
: son of a member of the Somoza Regime
3. A27 962 936 (3 attached applications, A28 644 922, A27 962 937, 938)
: member of Liberal Party
: accused of being a go-between for the Contras

: outspoken critic of Sandinistas

4. A28 344 077
: father was a member of National Liberal Party
: brother was a member of National Guard
5. A28 676 522
: member of National Liberal Party
6. A28 733 468 (4 attached applications, A28 813 101, A72 514 361, 362, 363)
: member of Liberal Party
7. A28 667 185
: alien's father registered voters during the Somoza regime
8. A28 565 525
: member of Liberal Democratic Party
: relatives were members of Somoza government
9. A28 549 378
: alien's grandfather was a Senator during the Somoza regime
10. A28 687 303 (attached applications, A28 687 304, 305)
: member of National Liberal Party
11. A28 666 673 (attached applications, A28 666 674, A28 688 573, 951, 574, 575)

- : daughter of the leader of the National Liberal Party
- : member of Pro-Somoza Teacher's Union

C. Aliens whose only claim for asylum was based on membership in Religious Organizations

1. A28 344 059
 - : member of Apostolic Church in Faith of Christ
2. A27 243 199
 - : member of the Jehovah Witness
3. A28 344 061 (attached application, A28 344 060)
 - : member of Apostolic Church in Faith of Christ

D. No Claims of any group affiliations contained in Alien's File

1. A29 592 271 (2 attached applications, A29 592 272, A29 964 093)
 - : no claims of affiliation to any group
2. A72 515 238
 - : no claims of affiliation to any group
3. A72 515 239
 - : no claims of affiliation to any group

4. A26 270 189
 - : no claims of affiliation to any group
 - : claims he will be persecuted for religious and political reasons
 5. A27 540 570/A27 540 471
 - : no claim of affiliation to any group
 6. T27 540 469
 - : no claim of affiliation to any group
 7. A28 560 368
 - : no claim of affiliation to any group
 8. A28 565 746
 - : although there is a letter from the Nicaraguan Resistance stating that alien was a collaborator, the alien claims he was at no point a Contra and he does not know where the letter came from
 - : alien states it is possible that the letter was the result of a favor from a friend
 - : the interviewer does not believe him to have been a member of the Contras
- E. Aliens who cite membership in Private Sector Organizations as the only reason they should be granted asylum
1. A28 565 924
 - : member of Nicaraguan Business Council in Exile, Nicaraguan American Private Council, and Nicaraguan Banker's Association

F. Aliens who apply for asylum based on affiliation with National Liberal Party as well as membership in Private Sector Groups

1. A28 646 900 (attached application, A28 865 775)
 - : member of Nicaraguan Workmen Federation and National Liberal Party
2. A27 963 378 (attached applications, A27 963 379, 380, A27 540 414)
 - : member of Nationalist Liberal Party, Nicaraguan Free Enterprise (FUNDE) and Superior Council of the Private Enterprise (COSEP)
3. A26 045 369
 - : member of Nicaraguan Red Cross with whom he helped persons seeking asylum in other embassies
 - : member of National Liberal Party
 - : member of Liberal Somocist Youth
4. A28 676 515
 - : member of National Liberal Party prior to 1979
 - : encouraged people to vote FSLN out of office
 - : organizer of covert groups to further Nicaraguan Free Enterprise System

G. Aliens who apply for asylum based on Sandinista Government's false accusations that they are members of Contras or other Anti-Communist Groups

1. A28 650 114 (attached application A28 669 913)
 - : no claim of affiliation to any group
 - : accused of being against the Revolution and and open critic of system
 2. A28 669 653 (attached applications, A28 669 657, 655, 658, 654)
 - : accused of cooperating with Contras and sent to jail
 - : no claim of affiliation to any group
- H. Aliens who cite disagreement with the governments political views as the grounds for their request for asylum
1. A28 632 840
 - : criticized Sandinista Regime's in his capacity as a lawyer
 - : discontinued membership in Liberal Party due to Sandinistas persecution of members and their families
- I. Aliens who cite various diverse reasons as grounds for asylum
1. A28 565 575
 - : alien was a member of the National Liberal Party
 - : alien's brother was a contra

2. A28 342 126
 - : alien's parents were denounced by State Security as Spies and Contras
 - : alien was member of Baptist Youth and Christian Movement
3. A28 548 597 (3 attached applications, A28 548 596, 598 599)
 - : alien was a member of the Conservator Party (PCN) and a member and vice-President of FAGANIC (a cattleman organization)
 - : accused of being a Contra
4. A28 344 062
 - : alien was a member of Somoza regime and a member of Apostolic Church in Faith of Christ
 - : alleged on his request for asylum that since he applied for asylum in a democratic country he will be accused of "being a contra" and a "political subversive"
5. A28 344 065
 - : wife of member of the Somoza Regime
 - : member of Apostolic Church in Faith of Christ
6. A28 784 466
 - : member of Roman Catholic Church
 - : accused of being a Contra due to her friendship with the nephew of the Nicaraguan Resistance Leader

7. A28 874 572 (attached application, A28 874 573)
 - : expressed disagreement with government
 - : cousin killed because he was a member of Contras
 - : Uncle was vice-Minister of Internal Revenue Ministry under Somoza regime
8. A28 351 312
 - : relatives were members of former Nicaraguan Army
9. A28 670 368 (attached applications, A28 670 370, 371)
 - : member of Battalion 4018 of Reserve but deserted in September 1986
10. A28 441 646
 - : husband was a member of the Daud Party and helped the Mujhedin
11. A28 549 480
 - : applicant's husband was a member of the Partido Liberal until 1979
 - : alien's parents belong to the FDN
12. A28 785 033 (5 attached applications, A28 785 035, 034, 036, A28 787 034, 038)
 - : attachment to request for asylum states his political views were not accepted
 - : legally represented a friend accused of contributing economic resources to the Contras
 - : legal representative of Nicaraguan Development Institute

APPENDIX 3 TO DIMIDJIAN DECLARATION

APPENDIX THREE: SUMMARY OF ALIEN FILES IN
THE CONTROL GROUP

**First number corresponds to principal applications;
second number includes family applications which are
attached to the principal applications

Control Group: 65/123

- A. Asylum Granted: 4/7
- B. Asylum Application Withdrawal: 1/1
- C. Asylum Denied, No Order to Show Cause: 6/12
- D. Asylum Denied, Order to Show Cause: 6/13
- E. In Process: 45/86
 - 1. 1987: 1/1
 - 2. 1988: 2/6
 - 3. 1989: 17/38
 - 4. 1990: 19/38
 - 5. 1991: 3/6
 - 6. 1992: 0
 - 7. 1993: 3/8
- F. Terminated For Lack of Prosecution, Order to Show Cause: 0
- G. Terminated For Lack of Prosecution, No Order to Show Cause: 3/4

Control Group: Asylum Granted

1. A27 920 642 (643, 644, 645) (Box One)
—granted asylum, 4/7/92
2. A28 342 127 (Box Four)
—Legal permanent Residence granted,
11/29/90
3. A28 560 456 (Box Four)
—Asylum granted 5/7/92
—Permanent residence status approved,
3/12/94
4. A28 565 839 (Box Four)
—Asylum granted, 4/16/92
—Granted status of Lawful Permanent
Resident, 2/7/94

Control Group: Asylum Application Withdrawn

1. A28 633 322 (Box Two)
—applicant withdraws application and informs
INS of his intention to return to Nicaragua,
7/6/92
—NB: no document showing departure

Control Group: Asylum Denied, No Order to Show
Cause

1. A28 630 548 (Box Two)
—Asylum denied, 9/8/93
2. A28 653 304 (Box Two)
—Asylum denied, 6/20/89

3. A28 821 729 (Box Three)
—Letter of failure to request interview after
Mendez and denying asylum (no date but
must be after 3/16/90)
4. A28 824 763 (Box Three)
—letter from attorney requesting Order to
Show Cause and hearing, 12/11/90
—asylum was denied 9/28/88
5. A23 727 457 (Box One)
—Asylum Denied, no date on letter
6. A28 306 080 (Box Four)
—Asylum denied 12/3/86 and reaffirmed denial
6/23/89

Control Group: Asylum Denied, Orders to Show
Cause

1. A27 520 949 (BOX ONE)
—Order to Show Cause, 2/14/94, for OVER-
STAY
2. A12 918 435 (Box One)
—Order to Show Cause, 5/2/94, for OVERSTAY
3. A23 729 725 (Box One)
—Order To Show Cause for OVERSTAY
4. A28 681 594 (Box Two)
—Order to Show Cause, 12/17/92, OVERSTAY
—Immigration Judge's Order, 6/21/94
: Asylum denied; any appeal due by 7/1/94
5. A28 739 465 (Box Three)
—Order to Show Cause, 3/28/94, OVERSTAY

6. A28 821 745 (Box Three)
 - a. Order to Show Cause issued 7/23/93 for over stay
 - b. Suspension of Deportation granted by Immigration Judge, 3/11/94

Control Group: In Process

- A. 1987
 1. A27 636 004 (BOX ONE)
 - Notice of Intent to Deny, 6/19/87
- B. 1988
 1. A28 685 389 (Box Two)
 - Interviewer recommends Denial, 2/22/88
 2. A28 564 579 (Box Four)
 - Interviewer recommends denial, testimony is not credible, 7/11/88
- C. 1989
 1. A27 962 032 (BOX ONE)
 - motion to reopen based on Cardozo, 9/1/98
 - had not previously been denied
 2. A27 723 985 (BOX ONE)
 - State Dept. Opinion, Deny, 10/25/89
 - Previously Denied (8/20/86) but motion to reopen based on *Cardozo-Fonseca* (8/8/88)
 3. A26 677 081 (BOX ONE)
 - State Dept. Opinion, Deny, 10/25/89
 - Previously Denied (10/19/84) but reopened after *Cardozo-Fonseca* (6/12/89)
 4. A26 049 753 (BOX ONE)
 - Notice of Intent to Deny, 6/28/89
 - Previously terminated for Lack of Prosecution, 2/24/84
 5. A28 625 752 (BOX TWO)
 - Interview Preliminary Assessment, 6/27/89, DENY

6. A28 653 688 (BOX TWO)
 - Initial Interviewer recommends Asylum is denied, 5/11/89
7. A28 670 979 (BOX TWO)
 - Interviewer recommends granting asylum, 12/14/89
8. A28 675 932 (BOX TWO)
 - Interviewer recommends Denial, 6/15/89
9. A28 676 015 (BOX TWO)
 - Interviewer recommends Denial, 5/24/89
10. A28 679 742 (BOX TWO)
 - State Dept. Advisory Opinion, Deny, 7/27/89
11. A28 742 043 (Box Three)
 - Applicant's rebuttal to Notice of Intent to Deny, 8/29/89
12. A28 850 176 (Box Three)
 - Interview Assessment, Deny, 6/29/89
 - Case status Printout of 7/30/93 states that last action was the BHRHA response on 7/12/89
13. A28 874 664 (Box Three)
 - Notice of Intent to deny, 6/28/89, and rebuttal which is not dated
14. A28 441 643 (Box Four)
 - Amended Denial stating that additional material is insufficient to establish a well-founded fear of persecution, 2/14/89

15. A28 565 655 (Box Four)
 - rebuttal to Notice of Intent to Deny, 7/7/89
 - ** Notice of Intent to Deny is not in folder
16. A28 565 749 (Box Four)
 - Notice of Intent to Deny, No Date
 - last document dated is State Dept. Advisory Opinion, Deny, 7/3/89
17. A28 557 775 (Box Four)
 - Interviewer recommends denial, 6/23/89 (with BHRHA sticker affixed disclaiming possession of factual material about this specific applicant)

D. 1990

1. A26 070 382 (Box One)
 - State Dept. Opinion, Deny, 5/8/90
 - Previously Denied (8/18/86) but motion to reopen after *Cardozo* (4/2/90)
2. A26 044 948, 949 (Box One)
 - State Dept. Opinion, Deny, 5/15/90
 - Previously Denied (10/10/84) but motion to reopen filed after *Cardozo* (6/12/89)
3. A28 650 143 (BOX TWO)
 - filed motion to reconsider, 3/13/90
 - previously denied, 9/25/87
4. A28 625 560 (BOX TWO)
 - letter (10/24/90) setting interview for 12/10/90
5. A28 666 511 (BOX TWO)
 - State Dept. Advisory Opinion, Deny 3/16/90
6. A28 667 022 (BOX TWO)
 - Interviewer recommends Denial of asylum, 10/16/90

7. A28 675 788 (BOX TWO)
 - Notice of Intent to Deny, 10/1/90
8. A28 688 484 (Box Three)
 - State Dept. Advisory Opinion, Deny, 6/7/90
9. A28 950 597 (Box Three)
 - State Dept. Advisory - Opinion, Deny, 6/12/90
10. A28 953 646 (Box Three)
 - Request for new interview, 5/4/90
11. A28 687 588 (Box Three)
 - Notice of Appointment for interview, 6/28/90 (plus memo to file 10/6/92 stating that an I-688 is to be issued on 10/26/92)
12. A23 727 037 (Box One)
 - Right to secure a new interview after *Mendez* 5/18/90
 - Letter denying asylum is not dated but since it refers to 2/9/88 Notice of Intent to Deny we can assume the denial occurred before 5/18/90
13. A28 558 171 (Box Four)
 - Interviewer recommends denial, not credible, 4/3/90
14. A28 565 631 (Box Four)
 - State Dept. Advisory Opinion, DENY, 3/16/90
15. A28 291 282 (Box Four)
 - State Dept. Advisory Opinion, Deny, 4/16/90
16. A27 719 134 (Box One)
 - State Dept. Advisory Opinion, Deny, 6/15/90

17. A28 688 614 (Box Three)
—interviewer recommended denial, 1/16/90
18. A28 687 848 (Box Three)
—interviewer recommended denial, 1/30/90
19. A26 671 833 (Box One)
—State Dept. Opinion, Deny, 3/29/90
—Motion to reconsider had been filed after
Cardozo

E. 1991

1. A27 520 876 (BOX ONE)
—Request for an Order to Show Cause filed
by applicant's attorney Nelson 11/1/90,
11/19/99, and finally 3/5/91
2. A28 679 418 (BOX TWO)
—I-765 approved 1/4/91
3. A28 687 752 (Box Three)
—State Dept. Advisory Opinion, Deny,
2/7/91

F. 1992

G. 1993

1. A28 866 363 (BOX TWO)
—employment authorization granted,
2/22/93
2. A28 643 381 (BOX TWO)
—request for asylum still pending because
he was interviewed before the new asy-
lum program which commenced 4/1/91
(letter dated 6/8/93)
3. A28 687 889 (Box Three)
—refiling of amended request for asylum
and request to schedule a new interview,
3/3/93

—preliminary interview recommended de-
nial because of lack of evidence to sub-
stantiate applicant's claims, 1/20/89

Control Group: Terminated For Lack of Prosecution,
No OSC

1. A28 634 360 (Box Two)
—terminated 6/14/89
—no Order to Show Cause
2. A28 649 327 (Box Two)
—terminated, 8/27/87
—No Order to Show Cause
3. A28 634 385 (BOX TWO)
—Terminated application, 6/20/89
—No Order to Show Cause

Excerpts from FBI Report on the PFLP, filed by
Defendants as Exhibit 45 to Frank Knight
Declaration (filed March 1, 1996) . . .

U.S. Department of Justice
Federal Bureau of Investigation

POPULAR FRONT
FOR THE LIBERATION
OF PALESTINE (PFLP)
Los Angeles Area

[DOJ-FBI Seal omitted]

December 1986

Volume I of IV

International Terrorism Squad

Los Angeles Division

FOR OFFICIAL USE ONLY

POPULAR FRONT
FOR THE
LIBERATION OF PALESTINE

December 1986

PFLPSYNOPSIS

This document is a report representing the activities of the Popular Front For The Liberation of Palestine (PFLP) in the Los Angeles metropolitan area. It identifies the PFLP as a Marxist/Leninist international terrorist organization affiliated closely with the Soviet Union and its goals concerning Communism. The PFLP advocates the use of violence to achieve its goals to overthrow the United States of America (USA) and other legally constituted forms of government. PFLP international leader Secretary General George Habash has publicly announced after the USA air raids on Libya, that the PFLP would carry out violent attacks against American citizens. This report also sets forth specific documentation that identifies the PFLP as operating in the USA and that it has a well organized membership in the Los Angeles metropolitan area with overt and covert objectives. This report sets forth information which links the PFLP to other domestic and international leftist terrorist/revolutionary groups. It also identifies specific front organizations operated by the PFLP, its fund raising activities, leaders and associates of its Los Angeles leader, Khader Musa Hamide, and other overt PFLP activities.

The Immigration and Naturalization Service (INS) in Los Angeles is providing a major contribution to the investigation by attempting to determine if sufficient evidence is available to deport specific individuals involved in the PFLP in the Los Angeles area.

The document contains a list of evidence to support possible INS violations being committed by members of the PFLP in Los Angeles, California.

Documentation supporting these allegations are also included in the section under "Supporting Documentations". Original documents, reports, and photographs are available as well as Agents for testimony and court proceedings.

This report should be utilized in conjunction with the following two documents: "Popular Front For The Liberation Of Palestine," dated July 1985, produced by the Federal Bureau of Investigation (FBI), Terrorist Research and Analytical Center, Terrorism Section, Criminal Investigative Division; and "Popular Front For The Liberation of Palestine, New York Area," dated June 1986, Volumes one to three. These two documents are referred to as the (Bureau Document) and the (New York Document) respectively.

This report provides an addendum to the "Bureau Document" in order to set forth further information that identifies the PFLP as an ally of the Soviet Union and linked to the KGB of the Soviet Union. This report has also reproduced specific portions of the "New York Document" to preclude the user from having to locate the particular information in that document.

PFLP LOGO (1979)

[Logo omitted]

THE LOGO FOR THE POPULAR FRONT FOR THE LIBERATION OF PALESTINE DEPICTS THE GEOGRAPHIC OUTLINE OF PALESTINE. THE ARROW REPRESENTS THE GROUP'S RETURN TO THE PALESTINIAN HOMELAND.

[Map of The Middle East]



TABLE OF CONTENTS

	<u>Page(s)</u>
Synopsis	[163]
Purpose	[169]
Introduction	5
I. List Of Evidence To Support INS Investigations	6-7
II. PFLP Ties to the Soviet Union	
Addendum To The Bureau Unclassified	
Document On The PFLP	[163-165]
III. Overview Of The PFLP In The United States	12-13a
IV. PFLP Organizational And Reporting Structure	
In The United States	
Organizational Notes From Jamal Niser	
The Head Of The PFLP In The	
United States	[170-173]
Communicating To PFLP Headquarters In	
Damascus, Syria	19-26
V. Links To Other Terrorist/Revolutionary Groups	
PFLP Links To The Prairie Fire Organizing	
Committee	27-30
The Go-Between Espresso Bar-Cafe	
Meeting on May 15, 1984	31-32
The Carl's Junior Meeting	
On May 31, 1984	33
The PFLP Support For El Salvador	
Meeting On July 5, 1984	34
VI. Front Organizations And Publications Of The	
PFLP	
Committee For a Democratic Palestine (CDP)	
November 29 Committee For Palestine	
(N29CP)	

TABLE OF CONTENTS (cont'd)

	<u>Page(s)</u>
Democratic Palestine (DP) (Magazine)	35-37
Al-Hadaf (Magazine)	38-40
1978 Bookstore, Inc.	41-42
1978 Bookstore, Inc. Relation	
With Los Angeles, CA	43
National Mobilization For Peace Jobs and	
Justice Demonstration On April 20, 1985	44
St. John's Church Meeting	
On May 23, 1985	45
VII. Money Raising Activities Of The PFLP	
In The Los Angeles, California Area	46
The Ukranian Art Center Fund	
Raiser on July 3, 1994	47
The Saint Annes Melekite Church	
Fund Raiser On September 28, 1984	[173]
The San Diego, California	
Fund Raiser On February 9, 1985	49
The Saints Nicholas Cathedral	
Fund Raiser on February 23, 1985	50-57
* * * * *	
The Vetrans Of Foreign Wars (VFW)	
Fund Raiser On June 9, 1985	59
The Glendale Civic Auditorium	
Fund Raiser On February 15, 1985	[174]
VIII. Other Overt Activities Of The	
PFLP In The Los Angeles Area	
The Demonstration At The Israeli Consulate	
In Los Angeles, Ca On March 25, 1985	[177]
The Take Over Of The Arab Information	
Office In San Francisco, Ca	
From July 13 - July 17, 1983	64

TABLE OF CONTENTS (cont'd)

	<u>Page(s)</u>
IX. Contacts And Associates Of KHADER MUSA	
HAMIDE The Leader Of The PFLP In	
Southern California And Arizona	
Toll Record/Pen Register Information	
On KHADER MUSA HAMIDE	65
X. The Palestine Youth Organization (PYO)	66
Summary	[178]
XI. Supporting Documentations	
Tab #1: Jamal Niser Papers	68-131
Tab #2: Fund Raisers	132-281
Tab #3: Reports	282-343
Tab #4: Tolls	344-512
Tab #5: Surveillances	513-603
Tab #6: Demonstrations	604-606
Tab #7: Al-Hadaf/Democratic	
Palestine (DP)	607-923
Tab #8: Palestine Youth Organization	924-1080
Tab #9: Photographs	1081-1382

PFLPPURPOSE

The purpose of this report is twofold. The first and foremost purpose is to provide a document for the United States Immigration and Naturalization Service (INS) concerning investigation on specific activities of the primary leaders and members of the PFLP in the Los Angeles area for potential use by INS and other law enforcement agencies in their investigations. Los Angeles INS and other law enforcement agencies assisted in these investigations. The report sets forth, as does the New York report, the role those PFLP cells operating in the United States (U.S.) and the Los Angeles metropolitan area play in support of international terrorism and world communism, and the role non-U.S. citizens in the Los Angeles metropolitan area play in the leadership of those cells and PFLP activities.

The second purpose of this report is to make available a document to assist other field offices of the FBI, local and other federal law enforcement agencies in the Los Angeles area in understanding how the PFLP as an international terrorist group operates clandestinely within a free society and how it may transgress the laws of that society. The report will also provide a base of information to draw from.

This report is not classified but is "FOR OFFICIAL USE ONLY." It will be freely distributed to any interested law enforcement office, on a need to know basis.

It is noted that the United States Customs Service (USCS) played an important role in this investigation. Without their assistance numerous PFLP publications and supporting documents entering the U.S. could not have been obtained. USCS freely provided the publications and documents for analysis without requesting or expecting a response.

It is also noted that the Los Angeles Sheriff's Department (LASD), San Bernadino Police Department, San Bernadino Sheriff's Department, Riverside Police Department, Riverside Sheriff's Department and the Los Angeles Police Department (LAPD) played an important role in this investigation. Without the assistance of the surveillance teams and investigators of these law enforcement agencies, specific information set forth in this report on the activities of the leaders of the PFLP in the Los Angeles area would not be available.

It is anticipated that these other law enforcement will receive a copy of this report for their own investigative use.

This report is not being presented in a format suitable for prosecution. Being analytical, it will present and attempt to draw facts together and will make, at times, conclusions. A few will be noted as speculative. It is, however, expected to assist in determining if those aliens described herein are in violation of Section 241 (8 U.S. Code 1251) "General Classes of Deportable Aliens" and subject to administrative action by INS. It can also assist other Federal and local law enforcement agencies in setting forth those specific activities the PFLP is engaged in within the Los Angeles area. Those findings clearly indicative of criminality will be presented in proper prosecutive

format when and where applicable. If necessary for any INS administrative or other agency proceeding, FBI Los Angeles will furnish a Special Agent to attest to the facts herein.

Lastly, this report is a working paper, a tool. When referring to the TAB exhibit sections in Volumes II and IV, readers are requested to excuse the roughness of the presentation. In several instances the exhibits represent the work of several translators, some of whom did their own typing. In some cases, particularly the speeches, the sentences seem to ramble. This is due in part to the writer/speaker of the original work, as well as the ability of each translator to truly translate rather than simply transliterate. The reader, however, will have no problem understanding the overall meaning, the original authors intended to impart. The sections of this document have attempted to utilize the FBI reports which are utilized in prosecutive actions. These reports are referred to as FD-302's and Inserts.

In reading this report one will notice some disparity in the spelling of individuals' names. Because Arabic has a different alphabet from English, names are spelled phoenitically many times, without following the official translation system. Also, Arabic middle names are sometimes the first name of the father, and many times a person is known by his first and middle names only.

The INS statutes that the PFLP leadership may be violating, involve the sworn statements made by these individuals in application for Permanent Residence Alien Status or in application for U.S. Citizenship. In Summary, the statutes state that an alien who is a member of the Communist Party or any group

exposing that ideology may be ineligible under U.S. immigration law to become a United States citizen and may in fact be subject to deportation under Section 241, Title 8 U.S. Code, 1251. A PFLP leader, upon answering those questions in the presence of an examiner, and having signed an affidavit swearing to the truth of those answers may be in violation of Title 18, USC Section 1001, which states "whoever in any matter within the jurisdiction of any department or agency of the U.S. knowingly or willfully falsifies, conceals or covers up by any trick, scheme, or device, as material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

* * * * *

As set forth later, HAMIDE and his cadre appear to be involved in covert activity and are known to be involved in fund raising. From physical surveillances, it has been noted that HAMIDE meets often with individuals on a covert basis. Prior to these meets, HAMIDE and his assistants will perform extensive counter surveillances and evasive acts. (See Tab SURVEILLANCES).

The list of individuals on the PFLP mailing list should be checked carefully. The list reflects those domestic terrorist groups the PFLP is involved with, such as * * * LEONARD PELTIER, convicted bomber, and the Prairie Fire Organizing Committee (PFOC), MERYL GEFFNER, PAUL SCRIBNER,

FRANK DUHL, MARIA HAYDEE TORRES, convicted bomber, D. STERN, and HENRY BORTMAN.

On page four of NISER's translations, NISER speaks about visits of the PFLP leaders "to cover most of the activities . . . to be able to check all the work. . ." NISER has been observed having a variety of meetings with individuals when he comes to Los Angeles.

NISER's papers also admit that the PFLP had formed the following committees: the Unions, General Secretary, Administration Affairs, Information, and Political Department, Military. All of these committees were given missions decided and programmed by the leadership of the Chapter. Los Angeles believes KHADER HAMIDE is involved as at least a Chapter leader.

On the thirteenth page of NISER's translations, NISER stresses the need for the PFLP to have good leaders in each area, and that without these leaders the PFLP's ability to function and carry out its missions is severely hindered. KHADER HAMIDE is the type of leader the PFLP is seeking. HAMIDE is intelligent, aggressive, dedicated, and shows great leadership ability. By removing HAMIDE through criminal or deportation proceedings the PFLP will be severely hampered in Southern California.

On the seventeenth page of NISER's translations, NISER points out that the PFLP has established Military Chapters, that have been unable to keep the schedule due to other imposed activities. NISER did not specify whether these military chapters were inside or outside the United States.

On the eighteenth page, NISER sets forth the PFLP's progress in penetrating the General Union of Palestinian Students (GUPS), etc. It must be remembered that NISER was returning with these reports from Damascus, Syria in 1983. As of 1986 the PFLP

* * * * *

PFLP FUND RAISER ST. ANNES MELEKITE
CHURCH, NORTH HOLLYWOOD, CALIFORNIA

SEPTEMBER 28, 1984

(See Tabs: Fund Raisers, Photos)

On September 28, 1984 at 7:00 P.M. the PFLP held a fund raiser at the St. Annes Melekite Church, 11211 Moorpark Street, North Hollywood, California. KHADER HAMIDE was the primary organizer of the fund raiser.

The fund raiser began at 7:00 P.M. It was announced at the fund raiser that \$2100 was collected from donations and four hundred tickets had been sold at \$10.00 per person or seven dollars per student. Approximately two hundred fifty people attended the fund raiser. It was estimated that a total of approximately \$6100 was collected. The collected money was given to PIERRE ALWAN, President of U.S. Omen, South Bay Chapter. It was announced that ALWAN made a personal donation of \$600.00.

HAMIDE was the primary individual responsible for setting up the fund raiser which from the banners over the main stage and the topic of the primary keynote speaker HABIB SADEK, was to raise funds for the Lebanese National Resistance Front (LNRF). Photographs of JULIE MUNGAI, BASHIR AMER, and HAMIDE were obtained reflecting them selling

PFLP material at the fund raiser and operating the PFLP information counter.

At this fund raiser it was determined that U.S. Omen was a front organization for the collection of funds for the PFLP, and the transferring of those funds out of the United States.

The LNRF is a loosely organized group of young Arabs mostly in Southern Lebanon, who attempt to kill Israelis whenever or wherever they can. The fund raiser was attempting to raise funds, through U.S. Omen. The keynote speaker HABIB SADEK advised that the LNRF has no formal structure of support or organization and, therefore, needs the assistance of established groups. SADEK is known in the Arab community as a member of the Communist Party of Lebanon (CPL) and is alleged to have run for the Lebanese parliament on or about 1976 on the Communist Party platform.

HAMIDE was the second speaker at this fund raiser. HAMIDE spoke on the coalition between the PFLP and DFLP, the N29CP and the centralized leadership established for the National Liberation of Palestine.

* * * * *

* * * * *

PFLP FUND RAISER ON FEBRUARY 15, 1986
at GLENDALE CIVIC AUDITORIUM,
GLENDALE, CALIFORNIA
 (See Tabs: Photographs, Fund Raisers)

On February 15, 1986, a physical surveillance at the Glendale Civic Auditorium, Glendale, California, determined that the POPULAR FRONT FOR THE LIBERATION OF PALESTINE (PFLP) held a fund raiser at the auditorium on February 15, 1982.

At approximately 12:00 noon, approximately twelve Arab men and women entered the auditorium. An individual who was called AYMAN by his colleagues, removed the United States and California flags from their locations on the stage and placed them somewhere in the back area of the stage. AYMAN was a tall male Arab, black hair, moustache, wearing a grey jacket with a red stripe, and a white sweat shirt with black printing on it. Ayman has been identified as AYMAN OBEID, a PFLP Cadre member.

KHADER HAMIDE and JULIE MUNGAI arrived at the auditorium about 12:30 p.m. HAMIDE used the name GEORGE MUSA with the city personnel at the auditorium.

Numerous posters depicting Palestinians with AK-47 assault rifles and other implements of war were posted throughout the auditorium. Also posted throughout the auditorium were long, white banners with black Arabic writing on them. Numerous photographs of the individuals assisting in setting up the fund raiser and attending the actual fund raiser were taken.

At about 3:49 p.m. JABR EL-WANNI, West Coast Regional Leader of the PFLP, arrived at the auditorium. EL-WANNI was the keynote speaker at the event.

The following individuals were photographed assisting in the fund raiser. All of these individuals are either cadre PFLP or supporters of the PFLP:

* * * * *

AYMAN OBEID, PFLP Cadre

* * * * *

MICHEL SHEHADEH, PFLP Cadre

KHADER MUSA HAMIDE, PFLP Leader in Souther California

JULIE MUNGAI, live-in girlfriend of KHADER HAMIDE,

PFLP Supporter

* * * * *

AMJAD OBEID, PFLP Cadre

* * * * *

NAIM SHARIF, PFLP Cadre

* * * * *

BASHAR AMER, PFLP Leader, San Bernardino, California

* * * * *

The stage contained a large flag of the PLO measuring approximately twelve feet by eighteen feet. The podium was to one side of the stage with a picture of GEORGE HABASH hung from it and the PFLP logo hung below HABASH'S picture. A second picture of HABASH was hung on the wall next to the podium.

The front of the stage was decorated with PLO and PFLP flags, as well as braided ribbon in the colors of the PLO flag. A small PLO flag also was opposite the podium in a standard.

Long tables were set up allowing 800 people to sit. On each table was a white tablecloth with a ribbon running the length of the table in the colors of the PLO flag. On each table were placed two red cutouts on stands of the PFLP logo. Each place setting contained a red placemat, napkin, and eating utensils, along with leaflets/letters.

The fund raiser began with an entrance ceremony. The house lights were dimmed and several PFLP Cadres marched into the auditorium from the center rear doors, and proceeded up the center of the auditorium to the stairs on either side of the stage. The entrants proceeded up the stage stairs and onto the stage stopping and facing the audience. During the entrance music was played. As the entrants entered the auditorium a slide show showing people from the Middle East was presented. Some of the male entrants/participants wore military fatigues. The women wore a traditional Palestinian dress.

SOUAD JABER carried the PFLP flag. IBRAHIM SAADEH carried the PFLP flag. AIAD BARAKAT, NAIM SHARIFF, BASHAR AMER, AMJAD OBEID, AYMAN OBEID, MAY HARB, ORAIB BUSTAMI, SAMIR MOHAMMAD, KHADER HAMIDE, HASSAN KRAYEM, and MICHEL SHEHADEH also were part of the entrance ceremony. In all about twenty-five people partook in the entrance ceremony. JABER EL-WANNI, MICHEL SHEHADEH, and SOUAD JABER were the main speakers at the fund raiser. KHADER HAMIDE, VICTOR DABBAH, and PIERRE ALWAN

were the primary individuals collecting the money during the fund raising portion of the event. Also HASAN KRAYEM, collected money from the audience, NAIM SHARIF, assisted in collecting money on the stage, AMAJAD OBEID collected money from the audience, and MICHEL SHEHADEH, assisted on the stage. HAMIDE, ALWAN, and/or DABBAH would obtain the money or pledge and hand it to an unknown male seated at a table on the stage who appeared to make an entry into a ledger. A large fat unknown male was also on the stage. This unknown individual would announce the name of the person making a donation and the amount of the donation or pledge.

Estimates of the number of people who attended the fund raiser ranged from 800 to 1,200 people. The event was well orchestrated.

The fund raiser finished about 11:00 p.m. Music and dancing continued until after midnight with HAMIDE and the cleaning crew leaving about 3:00 a.m. on February 16, 1986. The American flag was not returned to its standard on the stage.

Also observed at the fund raiser was * * * and * * * .

DEMONSTRATION AGAINST THE ISRAELI
CONSULATE, LOS ANGELES
MARCH 26, 1985

(See Tabs: Photos, Demonstrations)

On March 20, 1985, an individual provided a brochure concerning a demonstration to be held on March 26, 1985, at the Israeli Consulate in Los Angeles, California. The individual advised that HAMIDE was distributing the brochure.

On March 26, 1985, a demonstration was held at the Israeli Consulate in Los Angeles, California, at twelve noon, protesting the Israeli occupation of Lebanon. The demonstration per the brochure distributed, reflected the demonstration was sponsored by "the AD HOC COMMITTEE ON LEBANON."

Numerous photographs were taken including photographs of KHADER MUSA HAMID, alleged leader of the POPULAR FRONT FOR THE LIBERATION OF PALESTINE (PFLP).

During the course of the demonstration and subsequent to the demonstration, HAMIDE was observed speaking with numerous individuals of Middle-East descent. Some of these individuals wore PALESTINE LIBERATION ORGANIZATION (PLO) scarves and shirts. At all times it appeared that HAMIDE was the center of influence in his group. Other individuals consistently stood around HAMIDE and listened as HAMIDE spoke to them. At one point after the demonstration, a Middle-east male, wearing a PLO scarf and shirt ran up to HAMIDE, carried on a short conversation with HAMIDE, then ran approximately one and a half blocks to a second group of individuals and spoke to them. It appeared as if the male individ-

ual received information from HAMIDE and then passed it on to the other group. Those people in the other group were BASHIR AMER and * * * known PFLP Cadre.

During the demonstration, HAMIDE was observed and photographed carrying an anti-U.S., anti-Israeli placard.

Other PFLP members/leaders and other known supporters of the PFLP who assisted HAMIDE at the demonstration were:

* * *

MICHEL SHEHADEH - PFLP

* * *

* * *- PFLP

NAIM SHARIF - PFLP

KHADER MUSA HAMIDE - PFLP leader
Southern
California

AYMAN OBEID - PFLP Long
Beach

* * *

BASHIR AMER - PFLP

* * *

* * * * *

SUMMARY

This document attempts to set forth some of the activities of the PFLP in Southern California and to show how PFLP objectives are being carried out. It also attempts to show that the PFLP's objectives are the result of decisions made through a chain of command emanating from GEORGE HABASH's headquarters in Syria. It also attempts to show that the PFLP is interested in no less than the subjugation of the entire world under a Communist regime, and not the mere establishment of a Palestinian state. While the PFLP used to be referred to as being under the umbrella of the PLO, to date, the greatest detriment to the PLO organization and its effectiveness has been the defection of the PFLP and other Palestinian groups opposed to YASIR ARAFAT's leadership. The PFLP for years has been operating independently of the PLO and has been instrumental in destroying any peace efforts the PLO or United States have attempted.

Large sums of money are being collected by the PFLP in the United States to fund its violence and terror machine. This document hopes to identify key PFLP people in Southern California sufficiently enough so that law enforcement agencies capable of disrupting the PFLP's activities through legal action can do so. As one can readily observe, the amount of information obtained is voluminous, however, if terrorism and the deliberate aiding and abetting of that terrorism by the PFLP in America is to be stopped or hindered, law enforcement should become aware of the material provided herein. The material in this document has been presented for this purpose. However,

the material interrelates in far more ways than could be set forth in this document.

The PFLP has been around for many years operating in this country with little or no interference. It has become so well organized that it operates in a manner similar to organized crime groups. The PFLP has its attorneys, leaders, and followers, its money system and its secret and illegal system. Members come to the United States and lie in application for Permanent Resident Alien Status (Green Card), lie in Application for U.S. Citizenship and frequently are advised by PFLP leaders to marry solely for a Green Card (marriage fraud). This document attempts to link PFLP activities occurring in Los Angeles to those emanating from Damascus, Syria.

The individuals identified as being heavily involved in the PFLP should not be allowed to obtain Green Cards or U.S. citizenship. PFLP people, by virtue of their creed, hate the United States and all the U.S. Constitution stands for. Further, the PFLP tax exempt organization should not be allowed to collect money without the close oversight of law enforcement agencies ensuring that this money is neither expended to support terrorist activities, nor collected in an illegal manner.

FD 302 (Rev. 3-8-77)

1

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 2/27/85

A Confidential Source who has provided reliable and accurate information in the past, provided the following information concerning the fund raiser held on February 23, 1985 by the POPULAR FRONT FOR THE LIBERATION OF PALESTINE (PFLP) at ST. NICHOLAS ORTHODOX CATHEDRAL, 2300 West 3rd Street, Los Angeles, California. The PFLP is a Marxist Leninist international terrorist organization.

Asset provided the following material which will be described later in greater detail.

* * * * *

Four PFLP raffle tickets sold during the fund raiser.

One two page legal size Arabic document with a speech on page two by GEORGE HABASH. This document had been previously placed on each table.

One red colored program setting forth the events that took place at the fund raiser.

Investigation on * * * at * * * File # * * *

by SA FRANK H. KNIGHT/rdw Date dictated 2/27/85

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency, it and its contents are not to be distributed outside your agency.

Continuation of FD 302 of Confidential Source On * * * Page 2

One book entitled, "Beirut, 1982", showing photographs of the Israeli invasion into Lebanon and scenes of the Sabra and Shatila massacres. This book was being sold at the fund raiser.

One book entitled Zionist Propaganda in the United States: An analysis by FAYEZ A. SAYEGH. This book was being sold at the fund raiser.

One book entitled, American Aid to Israel: Nature and Impact, by MOHAMED EL-KHAWAS/SAMIR ABED-RABBO. This book was being sold at the fund raiser.

The asset provided an edition of the December, 1984, magazine, The News Circle, Arab Americans' Affairs, which contains an article on page 6, pertaining to U.S. Omen. U.S. Omen has previously been identified by the asset as the organization that is responsible for collecting and forwarding overseas the funds obtained by the PFLP.

Approximately 800 to 1000 individuals attended the fund raiser. The fund raiser was described as the most organized and well orchestrated PLO event ever seen by the asset.

Approximately 25 women and the Women's PFLP Auxiliary in San Diego, California assisted in preparing the food and other activities for the fund raiser. Other individuals from San Diego, not further described at this time, also attended and assisted in preparing for the fund raiser.

The total amount of money collected was not announced, however, the asset observed HAMIDE and his assistant MICHEL SHEHADAH collect the money and carry it into the lower level of the cathedral auditorium.

* * * ALI MAHMOUD YASIN was the PFLP leader from Riverside, California and worked very hard in helping to organize it. HAMIDE seated YASIN and his party at one of the head tables in the hall.

* * * Arizona, Riverside, California, San Diego, California, San Francisco, California, and Fresno, California attended the fund raiser. Approximately 60 ushers were utilized to assist in parking the guests as well as assisting in the program of events. The ushers wore red rectangular badges with the PFLP symbol and Arabic writing denoting the "PFLP" on it. The parking attendants wore red arm bands. The chief chef * * * used to cook for the guerrillas in the Palestinian camps located in the West Bank in Jordan.

MUDAR (LNU), subsequently identified as MUDAR YAGHI was one of the three keynote speaker. It is noted that MUDAR presented his speech in a very loud and excited manner. Asset identified MUDAR in surveillance photographs taken prior to the fund raiser.

HAMIDE was another speaker and an unknown female subsequently identified as NADA KRAYEM was the third speaker at the fund raiser. This female represented the LEBANESE NATIONAL RESISTANCE FRONT. * * *

Continuation of FD-302 of Confidential Source On * * * Page 3

* * * MUDAR took the podium, it was announced that no photographs would be allowed. When people protested this announcement, HAMIDE advised that all of the events and speeches were being video taped

and that the video tape will be made available to those desiring to see it.

An individual identified as NASSER HAMADALAH, attended the fund raiser. NASSER is a member of the DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE (DFLP). NASSER assisted in preparing for the fund raiser.

* * * * *

Continuation of FD-302 of Confidential Source On * * * Page 4

* * * * *

Continuation of FD-302 of Confidential Source On * * * Page 5

* * * * *

The four tickets to the fund raiser are identical to prior PFLP fund raiser tickets used at other PFLP fund raisers, to include the PFLP fund raiser in San Diego, California on 2/9/85.

The two raffle tickets, numbered * * * respectively, are white cards with black printing on one side only. A photograph is enclosed of the ticket.

The article on U.S. OMEN that occurred in the aforementioned issue of "The News Circle" reflected the following information.

The South Bay Chapter of U.S. Omen held its 23rd annual convention on 11/17/84, and named ARCHBISHOP CAPOUCCI as their "Man of the Year" "for his outstanding contributions to the cause of the Palestinian people".

Dr. NAJEEB KHOURY, Vice President of the chapter advised that CAPOUCCI was unable to attend the function due to the fact that he is exiled in Italy by the Israeli government, since 1971, "Because of his

political involvement on behalf of the Palestinian cause." The article continues by advising that due to these Palestinian involvements, CAPOUCCI was denied a visitor's visa to the United States and spoke to those at the convention by telephone.

\$15,000 was raised for CAPOUCCI's "work". He is characterized as "He is a very dynamic leader, and everybody listens". Of the \$15,000 raised, \$1000 went directly to CAPOUCCI. The remainder was "divided" among NAZARETH HOSPITAL and other areas of need", said VICTOR DABBAH, President of the U.S. Omen South Bay Chapter.

Continuation of FD-302 of Confidential Source On * * * Page 6

The conversation also presented awards to U.S. Omen members PIERRE ALWAN, past U.S. Omen national president and Dr., ELIAS GHANNAM of Las Vegas, "who generously supported the organization's financial objectives".

AWNI RAYYI, U.S. Omen national president announced that ADEL BARAKAT, business, donated \$20,000 to help build a medical center in the ANAT-BAH NABLUS district (East Palestine). RAYES added, that the U.S. Omen Board of Directors voted to send \$3000 to the Beir Zeit University to be used as scholarship awards to the needy and qualified students".

"Dr. RAY JALLOW past U.S. Omen national president, briefed the guests about U.S. Omen Educational Trust".

The U.S. Omen 1984-1985 national officers are:

AWNI RAYYI - President

FUAD DAYA - 1st Vice President

VICTOR DABBAH - 2nd Vice President

RAMZI ASFOUR - Treasurer

AHLA ARAKI - Secretary

The article also identified the following individuals:

VICTOR DABBAH - Vice President of the South Bay Chapter

Dr. MAJEEB KHOURY - President of the South Bay Chapter

PIERRE ALWAN - Past national president. It is noted ALWAN has been seen collecting and depositing the funds raised at PFLP fund raisers into the U.S. Omen accounts.

ADEL BARAKAT - Member and major contributor

Dr. RAY JALLOW - Past national president

Continuation of FD-302 of Confidential Source On * * * Page 7

Dr. JIHAD RACY - Musician

Dr. NABIL AZZAM - Musician

MARON SABA - Musician

ISSA HADAWAR - Musician

The article explains that U. S. Omen, a tax exempt humanitarian organization, means hope to thousands of needy and neglected individuals. Founded in 1961, U.S. Omen has continued for over two decades to extend a helping hand not only to the sick and destitute in the Middle East but in other parts of the world as well.

A legally constituted non-profit organization, U.S. Omen is chartered under the laws of the State of

California. Chapters in Los Angeles, San Francisco, and Torrance undertake programs that seek to improve the lives of the less fortunate. To implement its goals, U.S. Omen works with recognized and well-established charitable, medical and educational institutions both internationally and nationally.

The article continues by explaining due to volunteer help, the expense ratio to the amount collected is under five percent. "This means your donation goes directly to those in need".

* * * A bank draft is then sent to another organization, not yet identified, in the Middle East or Europe, which then passes the funds to the PFLP.

Asset also advised that the children are part of the entire recruitment policy in that they are indoctrinated in the anti-Zionism and anti-United States feelings of the PFLP and from such involvement involuntarily are passed on the hatred of those who produced them as progeny. The asset states that a popular saying among the PFLP is "So long as they (the PFLP) have a mother who delivers kids, the revolution will continue".

* * * * *

1

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 3/28/85

On * * * a confidential source, who has provided reliable and accurate information in the past, provided the following information concerning the Popular Front for the Liberation of Palestine (PFLP) fund raiser held at St. Nicholas Orthodox Cathedral, 2300 W. 3rd Street, Los Angeles, California on February 23, 1985. The PFLP is a Marxist/Leninist terrorist organization under the umbrella of the Palestine Liberation Organization(PLO).

During the PFLP fund raiser on February 23, 1985 KHADER MUSA HAMIDE, PFLP leader in Los Angeles, California, would announce the amount of money and the names of those individuals who gave money. Individuals were giving \$20 to \$200.

U.S. Omen collected the money. It announced that checks were to be made out to U.S. Omen and that by making the checks payable to U.S. Omen, the donation would be tax deductible.

Investigation on * * * at * * * California File # * * * .

by SA FRANK H. KNIGHT/rdw Date dictated 2/27/85

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency, it and its contents are not to be distributed outside your agency.

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

FD 302 (REV 3-8-77)

1

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 4/9/85

A confidential source who has provided reliable information in the past provided the following information:

On 2/23/85, the POPULAR FRONT FOR THE LIBERATION OF PALESTINE (PFLP) held a fund raiser at the ST. NICHOLAS CATHEDRAL, in Los Angeles. KHADER HAMIDE, Los Angeles PFLP leader, organized and hosted the fund raiser. MUDAR YAGHI and NADA KRAYEM also spoke at the function with YAGHI billed as the keynote speaker. No photographs were allowed to be taken once YAGHI took the podium, for security reasons. HAMIDE had an individual video tape the entire fund raiser. The video tape shows in video and audio the speeches presented by HAMIDE, YAGHI and KRAYEM as well as other individuals who partook in the fund raise. HAMIDE advised that it takes a lot of experience and trials to organize the fund raiser. HAMIDE advised he has been doing these fund raising events for ten (10) to twelve (12) years in the United States. HAMIDE continued by stat-

Investigation on * * * at * * * File # * * *.

by SA FRANK H. KNIGHT/rdw Date dictated 2/27/85

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

ing that the PFLP carries out these fund raisers throughout the U.S. and that he is part of the PFLP in the U.S. HAMIDE advised that after his fund raiser on 2/23/85, he and MUDAR (YAGHI) traveled to San Francisco where they attended the PFLP fund raiser in San Francisco on 2/24/85. HAMIDE described MUDAR (YAGHI) as 24 years old and a valuable asset to the PFLP.

HAMIDE advised that he is very dedicated to the PFLP and does not work very much in order that he can dedicate most of his time to his PFLP activities. HAMIDE also advised he "works for U.S. Omen". U.S. Omen is known as a humanitarian, tax exempt, non-profit organization established in California, for helping the Palestinians in Lebanon. It is also the front organization used by the PFLP to collect the PFLP fund raiser money in the U.S. and transfer it to the Middle East.

HAMIDE advised that he was never in Russia but was involved in the PFLP in the West Bank area of the Middle East prior to coming to the U.S. and that he is unable to return to the West Bank area because he is wanted by the authorities.

While discussing his PFLP activities in Los Angeles, HAMIDE advised that he also did the same sort of work for the PFLP in Oregon while he attended school there. He advised that he was involved in "educating new Arabs" about the PFLP while in Oregon.

Continuation of FD-302 of _____ On * * * Page 7

HAMIDE advised he wrote the following articles "Political Program for Palestine Salvation Front", which is anti-REAGAN and anti-MABARAK; "George Habash to Palestinians", and "Important Article in Occasion of Creation of Palestine Salvation Front". Copies of these articles were obtained subsequent to the 2/23/85 fund raiser finishing.

HAMIDE advised that the "PFLP was the same as the JIHAD ORGANIZATION". He explained that it was the PFLP that "blew up" the Marine barracks, Israeli barracks and French barracks in Lebanon but utilized the name of the JIHAD. HAMIDE continued by advising that the PFLP had fighters once more in Southern Lebanon and the Beka Valley.

HAMIDE stated that the PFLP is associated with the LEBANESE NATIONAL RESISTANCE FRONT in that it is a coalition of the PFLP, COMMUNIST PARTY OF LEBANON and other radical factions that "believe the gun and force is the only way to defeat their enemies".

HAMIDE advised he did not have time to get married, nor was he ready to get married to JULIE MUNGAI because he (HAMIDE) felt that if he did marry, "he would not be able to continue his involvement as he is now in the PFLP".

* * * * *

FD 362 (REV 3-8-77)

1

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 10/16/86

A Confidential Source who has provided reliable and accurate information in the past provided the following translations concerning the POPULAR FRONT FOR THE LIBERATION OF PALESTINE (PFLP) fund raiser at the GLENDALE CIVIC CENTER Auditorium, Glendale, California on February 15, 1986.

A cassette tape utilized by Federal Bureau of Investigation (FBI) Special Agent (SA) FRANK H. KNIGHT and IMMIGRATION AND NATURALIZATION SERVICE (INS) * * * during a surveillance of the PFLP fund raiser was translated. A portion of the tape had recordings of speeches given by selected individuals. The translations follow in the order of

SOUDA JABER ATIEH (wife of SAMIR A. MOHAMMED, aka Simir Atieh, a PFLP leader in Los Angeles).

MICHEL NAIF IBRUHIM SHEHADEH, a PFLP leader in Los Angeles. SHEHADEH was the Master of Ceremony at the fund raiser.

Investigation on * * * at * * * California File # * * * .

by SA FRANK H. KNIGHT/rdw Date dictated 2/27/85

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency, it and its contents are not to be distributed outside your agency.

Continuation of FD-302 of Confidential Source On * * * Page 2

JABER EL WANNI, PFLP leader from Ohio, was the highest ranking PFLP leader at the fund raiser and keynote speaker.

SOUDA ATIEH carried the Palestinian flag into the fund raiser during the entrance ceremony.

KHADER HAMIDE was the overall organizer of the event.

The following other Los Angeles PFLP members and organizations assisted in the event:

NADIM HASAN, U.S. OMEN, ISSAM RAFEEDIE, ALI YASIN, HAITHAM ARANKI, NAZEEH ARANKI, EMAD ASFOUR, AWWAD ADY, NAIM SHARIF, AYMAN OBEID, AMJAD OBEID, MAY HARB, AWAD BADDOUR, AIAD BARAKAT and BASHIR AMER.

SIDE B:

Announcement by the female who carried the Palestinian flag (SAMIR ATIEH's wife).

LADIES AND GENTLEMEN:

Everything that is Palestinian is a traditional thing we should cherish, even our folkloric dancing.

Let us dance and be happy because it will annoy the Zionist enemy who wants us to suffer. It is like a thorn in their mouth and eye when we dance.

MICHELLE SHAHADA (SHEHADEH) gave the pledge of allegiance and people on stage repeated after him at the opening of the event.

THE PLEDGE:

To our glorious flag, I swear to you, by every molecule of sand from the Palestinian land, by every drop of water from Palestinian springs and rivers, by every tear of a Palestinian baby who is deprived, by the tear of every Palestinian mother who suffered, by every drop of blood that was sacrificed for the love of Palestine, by the name of every widow, by the name of every mother and father who sacrificed their children, and by the name of the tree that has been cut, and the house that was destroyed, by the name of every suffering moans of the Palestinian people, by the "Shakra Dome and the Noble Mosque" and the "Mehdi Church and Kiyama Church" by the name of Yafa and Haifa Shores, by the name of Jalil and Ramallah villages, by your name, our Palestinian flag, the flag of resistance, I will stay proud to be Arabian, sincere and active for the revolution, for the sake of the country and the people and the national cause . . .

END OF PLEDGEMICHELLE SHAHADA's - Master of Ceremony

By the name of the Palestinian Democratic committees and the Palestinian Victims Organization in Los Angeles, in this national celebration for the 18th anniversary of the PFLP, this strong and ideal front that sacrifices and gives generously everyday.

Eighteen years united us by all the sacrifices and all the heroes and martyrs to continue the struggle and fight towards liberation of the homeland that has been abducted and taken by the Zionist enemy; our homeland that we worship and love. Eighteen years passed and the PFLP have never lost hope of victory and liberation, we are very confident in our hearts that he will succeed and that moves us towards sacrifice and struggle, and on the other hand our strong will gives up a stronger faith in the strength and power and its ability to create miracles, and reaching goals that has been very difficult, but some of those goals have been reached through a lot of human sacrifices and coaches of martyrs.

We will always celebrate to assure our enemies and its allies that we will never give up and we will never be tired of struggling, but we will fight and fight for our homeland and our rights, and nothing will stop us, not the enemy's barbaric actions and their sophisticated weapons.

I stand before you today, to renew the vow to continue the long struggle, with a firm determination to destroy the zionist occupants no matter how strong it is and how powerful it is; I stand before you to ask you

to unite with us and work together to defeat the enemy and to bring the PLO back to its national line.

I stand here today to tell the martyrs that we will continue the revolution and the fight no matter what dangers we encounter, and we promise you that we will fight until victory or death.

Continuation of FD-302 of Confidential Source On * * * Page 4

SIDE A

Parts concerning MAYOR ZAPHIR AIMASRI from JABER's speech:

We see Israel practicing its "Ironfist" policy by arresting our people daily and torturing them, it takes over land and property, and it bombs houses. Israel is imposing its rule inside the occupied land and cooperating with the Jordanian regime and the U.S. leadership to select the governors and mayors . . . We saw Israel appointing ZAPHIR AL-MASRI as a mayor for Nablus instead and substituting the patriot BASSAM AL-SHAKAA who gave everything he owns for the Palestinian cause. The Zionist monster is working towards controlling all the mayors by appointing the ones who cooperate with them and become Israel's agents, not only in Nablus, but also in Almiri and Ramalla, those are agents of Israel and the Jordanian regime, and the Palestinian right wing who support the Amman Agreement. We see those agents:

- 1 - HIKMAT AL-MASRI
- 2 - NAJAT AL-SHAWA
- 3 - BREISH
- 4 - ABOUL ZOLOF
- 5 - HANNA SENIORA
- 6 - FARIS ABOU RAHUCH

Those agents are forming committees in the occupied territories.

Those agents and traitors will be punished very harshly by our people, and we will not have mercy for them just like we did not have any mercy for previous traitors in the past like:

- 1 - AZIZ SHEHADAH
- 2 - KADER DAV
- 3 - JENHOU
- 4 - and others

Our people in their resistance for the Zionist enemy and the U.S. policy is terrorizing these enemies and spreading terror into their hearts. As a result, we see the USA stretching and showing off its muscles through its naval fleet in the Mediterranean".

* * * * *

* * *

FHK/tmp

1

The following investigation was conducted by SA FRANK H. KNIGHT, of the Federal Bureau of Investigation (FBI), on April 20, 1985, at Los Angeles, California.

On April 20, 1985, KHADER MUSA HAMIDE, alleged leader of the Popular Front for the Liberation of Palestine (PFLP), in Los Angeles, California, was observed and photographed attending and partaking in the demonstration titled "The National Mobilization for Peace, Jobs, and Justice Demonstration and Rally". The demonstration and rally began at Broadway and Olympic in Los Angeles at 11:00 AM and was to conclude at the Los Angeles City Hall at 1:00 PM. HAMIDE was observed carrying a anti-U.S. banner. HAMIDE was in a group of Middle East males carrying banners, one of which was the banner for the November 29 Coalition. Photographs of HAMIDE were obtained.

* * *

FHK/tmp

1

On March 26, 1985, the following investigation was conducted by Special Agents (SAs) FRANK H. KNIGHT, * * * of the Federal Bureau of Investigation (FBI) at Los Angeles, California.

A demonstration was held at the Israeli Consulate in Los Angeles, California at twelve noon, on March 26, 1985 protesting the Israeli occupation of Lebanon.

The demonstration, per a brochure distributed, reflected the demonstration was sponsored by "the AD HOC COMMITTEE ON LEBANON". Numerous photographs were taken of those individuals partaking in the demonstration to include photographs of KHADER MUSA HAMIDE, alleged leader of the Popular Front for the Liberation of Palestine (PFLP).

During the course of the demonstration and subsequent to the demonstration HAMIDE was observed speaking with numerous individuals of middle east descent. Some of these individuals wore Palestine Liberation Organization (PLO) scarves and shirts. At all times it appeared that HAMIDE was the center of influence in his group. Other individuals consistently stood around HAMIDE and listened as HAMIDE spoke to them. At one point after the demonstration a middle east male wearing a PLO scarf and shirt ran up to HAMIDE, carried on a short conversation with HAMIDE, then ran approximately one and a-half blocks to a second group of individuals and spoke to them. It appeared as if the male individual received information from HAMIDE and then passed it on to the other group.

During the demonstration, HAMIDE was observed and photographed carrying an anti-U.S., anti-Israeli placard.

* * * * *

The following investigation was conducted by Special Agent (SA) FRANK H. KNIGHT of the Federal Bureau of Investigation (FBI), in Los Angeles, California, on March 26, 1985.

The following attached photographs reflect KHADER MUSA HAMIDE and several of his associates partaking in a demonstration that was held in front of the Israeli Consulate in Los Angeles on March 26, 1985 protesting the Israeli occupation of Southern Lebanon. HAMIDE is the alleged leader of the Popular Front for the Liberation of Palestine (PFLP), in Los Angeles, California. The photographs reflect HAMIDE at one point carrying a sign which states, "Stop U.S. Aid to Israel".

The demonstration was entitled "March 26th, National Day of Solidarity with the People of Southern Lebanon". Prior to the demonstration it was known that HAMIDE was distributing the brochures advertising this demonstration and that he had been overheard stating that he would attend the demonstration. The brochure reflected that ~~it~~ was sponsored by the "Ad Hoc Committee on Lebanon". A partial list of the members of this Ad Hoc Committee was also listed. The partial list of members comprised JAMES ABOUREZK, American Arab Anti-Discrimination Committee, Archbishop PHILIP SALIBA, American Druze Society, IMAM CHIRRI, Palestine Aid Society, Arab Women's Council, United Holy Land Fund, American Federation of Ramallah, Palestine, ABDEEN JABARA, Association of Arab American University Graduates, Committee for Democratic Palestine, JIM KADDO, Middle East Information and Research Project, Palestine Congress of North America, General Union of Palestinian Students, RICHARD SHADYAC, HAROLD SAMHAT, Committee for Democratic Lebanon, and Supporters of the Lebanese Resistance Front. It is noted that Committee for a Democratic Palestine is a

frequently used title in the U.S. for the PFLP, which is a Marxist/Leninist oriented terrorist group under the Palestine Liberation Organization umbrella. The PFLP has avowed in its statements by its leader that it is interested in over-throwing the U.S. Government.

* * *

FHK/rdw

* * * * *

The following investigation was conducted by Special Agent (SA) FRANK H. KNIGHT at Los Angeles, California on April 20, 1985.

On April 20, 1985, numerous photographs were obtained of KHADER MUSA HAMIDE, AMER ADI, MICHEL SHEHADEH and SAMIR ADEEB MOHAMMED, aka Samir Atieh partaking in a demonstration against U.S. involvement in the Middle East.

"The NOVEMBER 29 COMMITTEE FOR PALESTINE" (N29CP) had two banners as well as those carried by HAMIDE, SHEHADEH, ADI, and ATIEH.

Copies of these photographs are attached.

FBI Memorandum on Julie Mungai

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Los Angeles, California

November 3, 1986

JULIE NYANGUGI MUNGAI
ALSO KNOWN AS
JULIA NYANGUGI MUNGAI
JULIE MUNGAI
INTERNATIONAL TERRORISM -
POPULAR FRONT FOR THE LIBERATION OF
PALESTINE (PFLP)

The investigation of JULIE MUNGAI was predicated on repeated information being received that MUNGAI was the live-in girlfriend and now wife of KHADER MUSA HAMIDE, and assists HAMIDE in his PFLP activity. HAMIDE is the leader of the PFLP in Southern California and Arizona.

The PFLP is a Marxist Leninist international terrorist organization whose leaders have avowed to overthrow the United States and other constitutional governments, by utilizing violent unconstitutional means. The Secretary General of the PFLP, GEORGE HABASH has made statements to U.S. News personnel that the PFLP will carry out violent attacks against U.S. persons within and outside the borders of the U.S.

According to HAMIDE's IMMIGRATION AND NATURALIZATION SERVICE (INS) file, HAMIDE advised that MUNGAI supported him financially be-

cause he was unable to find a job since his graduation from the UNIVERSITY OF OREGON with a Master's Degree in Marketing and Transportation. HAMIDE has also confided to individuals that MUNGAI supports him because his PFLP work requires so much time that he does not have time to work.

HAMIDE claimed to INS that he was married to MUNGAI; however, no record is available that reflects the marriage.

On September 28, 1984, the PFLP in conjunction with the DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE (DFLP), the PROGRESSIVE SOCIALIST PARTY AND COMMUNIST PARTY OF LEBANON

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

JULIE NYANGUGI MUNGAI

sponsored a fund raiser for the LEBANESE NATIONAL RESISTANCE FRONT (LNRF) at ST. ANNE MELIKITE CHURCH in North Hollywood, California. The PFLP and DFLP were the only groups that set up information and sales tables. The PFLP table, as the attached photographs depict, was staffed by MUNGAI, HAMIDE and BASHAR AMER, a PFLP leader under HAMIDE. The DFLP table was staffed by WALID HAWATMEH. As the photograph depicts, an extensive array of literature was available as well as posters, shirts, PLO flags, calendars, and kifas. The fund raiser was primarily organized by the PFLP and collected funds to assist the LNRF efforts to strike at Israeli forces in Southern Lebanon. Approximately \$2100 (U.S.) were collected from donations.

On February 9, 1985, MUNGAI was observed attending the PFLP fund raiser in San Diego, California.

On February 23, 1985, a physical surveillance observed and photographed MUNGAI assisting in setting up a PFLP fund raiser at ST. NICHOLAS CATHEDRAL, in Los Angeles, California. KHADER HAMIDE was responsible for setting up the fund raiser and was the Master of Ceremonies. MUDAR YAGHI, a PFLP leader in the United States, was the guest of honor. The fund raiser was attended by approximately 800 attendees and collected approximately \$30,000 to \$40,000 (U.S.) The mood of the fund raiser was anti-U.S., anti-Israel, and anti-peace settlements. A reasonable person attending the fund raiser would realize the money being collected was not to be utilized for humanitarian causes but for violence.

On February 15, 1986, a physical surveillance observed and photographed MUNGAI assisting in setting up the PFLP fund raiser at the GLENDALE CIVIC AUDITORIUM in Glendale, California. Approximately 1200 people attended the fund raiser. It was estimated that \$80,000 to \$130,000 was raised for the PFLP.

Investigation believes MUNGAI is not a cadre member of the PFLP, however, she is a supporter of the PFLP and is active in the overt political activities of the PFLP and the coordination of those activities with other "Progressive" communist movements both foreign and domestic.

In view of the fact that MUNGAI has been residing with HAMIDE since 1982 and supports him financially, MUNGAI occupies an important role in the PFLP. MUNGAI is presumed to be aware of all aspects of HAMIDE's activities. MUNGAI is aiding and abetting the PFLP through her support role.

JULIE NYANGUGI MUNGAI

MUNGAI is presently out of status with the IMMIGRATION AND NATURALIZATION SERVICE (INS) and is no longer employed in the U.S. as of December 28, 1984.

The following descriptive information has been developed on MUNGAI.

Name	JULIE NYANGUGI MUNGAI
Aliases	Julia Nyangugi Mungai Julie Mungai Julie N. Mungai
Date of birth	January 31, 1958
Place of birth	Nairobi, Kenya
Driver's License #	C2709032, California
Sex	Female
Race	Black
Height	5'6"
Weight	125 pounds
Hair	Black, curly
Eyes	Brown
Address	600 North Louise, #8 Glendale, California, 91206
Telephone	(818) 500-8358
Permanent address	P.O. Box 42425 Nairobi, Kenya

Attached hereto are the photographs referred to above.

FBI Memorandum on Amjad Obeid

U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Los Angeles, California

November 3, 1986

AMJAD MUSTAFA OBEID
ALSO KNOW AS
AMJAD OBEID
INTERNATIONAL TERRORISM -
POPULAR FRONT FOR THE LIBERATION OF
PALESTINE (PFLP)

This investigation was predicated upon information that was obtained over an extended period of time that has identified AMJAD OBEID as a key PFLP cadre member or leader in the Los Angeles Metropolitan area. It is known that OBEID is directly involved with KHADER MUSA HAMIDE, the PFLP leader for Southern California and Arizona.

The PFLP is a Marxist Leninist international terrorist organization whose leaders have avowed to overthrow the United States Government through violent unconstitutional means. GEORGE HABASH, Secretary General of the PFLP has also made statements, to U.S. News personnel that the PFLP will carry out violent attacks against U.S. Citizens within and outside the U.S.

The attached photographs readily show OBEID assisting and meeting with HAMIDE and other known PFLP cadre members and leaders during fund raising events.

On February 23, 1985 AMJAD OBEID was observed and photographed (see enclosed photos) assisting in setting up and participating in the ceremonies of the PFLP fund raiser held at the ST. NICHOLAS CATHEDRAL in Los Angeles, California. OBEID took part in the opening ceremonies and later in the dancing portion of the fund raiser. A video showing AMJAD OBEID

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency. It and its contents are not to be distributed outside your agency.

AMJAD MUSTAFA OBEID

participating in the entrance ceremony and dancing was obtained. OBEID's images appear at counter marker 582-597, 1936-2376 and 3281-3500. The speeches provided by KHADER MUSA HAMIDE, were anti-U.S., anti-Israeli and anti-Jordan in terms of advocating violence toward these governments and the overthrow of the Amman accord, and the Camp David accord. Translations of these speeches are available on request. Money was collected for the LEBANESE NATIONAL RESISTANCE FRONT (LNRFF). The LNRFF is a coalition of leftist groups operating in Southern Lebanon to fight the Israeli invasion of Lebanon. The PFLP and LEBANESE COMMUNIST PARTY OF LEBANON (LCP) are the strongest supporters of the LNRFF.

On June 9, 1985, AMJAD OBEID was observed and photographed (see enclosed photos) assisting in setting up and attending the PFLP fund raiser held at the VETERANS OF FOREIGN WARS (VFW) Hall, in San Bernardino, California. JAMAL NISER, the PFLP leader in the United States was the keynote speaker. KHADER MUSA HAMIDE was in charge of

setting up the event. OBEID is the male Arab wearing a shirt with horizontal stripes.

On November 29, 1985, OBEID was observed attending the PFLP sponsored concert "Almayadine" at San Diego, California. Almayadine is a musical group associated with the LCP in Lebanon. The concert keynoted MARCEL KHALIFE who is a member of the Communist Party in Lebanon. The concert was advertised under the name "Middle East Philanthropic Fund" and was held at San Diego on November 29, 1985 and in Los Angeles on November 30, 1985.

The LCP appears to be operating under the title of the LNRF in the Los Angeles area. Los Angeles has noted numerous joint fund raisers and meetings between the PFLP and the LNRF. Partaking in these fund raisers in support of the LNRF were known members and leaders of the LCP representing the LNRF.

During the concert in San Diego on November 29, 1985, the PFLP had a propaganda table set up and also arranged for the food that was served at the concert. OBEID appears to be in a non-leadership position within the PFLP, however, is considered to be a trusted cadre or "comrade" and is utilized by HAMIDE (supra) for a variety of tasks. OBEID is attending CALIFORNIA STATE UNIVERSITY LONG BEACH (CSULB) in Long Beach, California and is a full-time undergraduate student majoring in Civil Engineering with an anticipated graduation of August or December, 1987.

AMJAD MUSTAFA OBEID

The following identifying information was developed on OBEID:

Name	AMJAD MUSTAFA OBEID
Alias	Amjad Obeid
Date of birth	December 23, 1963
Place of birth	
Address as of September 26, 1986	1628 East 1st Street, #2 Long Beach, California, 90802
Telephone	(213) 597-3273
Address as of October 22, 1985	1102 Loma Avenue, #4 Long Beach, California, 90804
Address as of August 27, 1984	767 Freeman, #5 Long Beach, California, 90804
Sex	Male
Race	Palestinian
Nationality	Jordanian
Height	6 feet
Weight	145 pounds, medium build
Hair	Black, with beard and mustache
Eyes	Hazel
California Driver's License #	C4700694
INS #	
Occupation	Student at CSULB

Attached hereto are photographs referred to above.

FBI Memorandum on Ayman Obeid

U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No. 199H-2993

Los Angeles, California

November 3, 1986

AYMAN MUSTAFA OBEID
Also Known As
Ayman Obeid
INTERNATIONAL TERRORISM -
POPULAR FRONT FOR THE
LIBERATION OF PALESTINE (PFLP)

The investigation of AYMAN OBEID was predicated upon repeated information being received that he is a member of the PFLP in the Los Angeles area and is a trusted cadre subordinate under KHADER MUSA HAMIDE, the leader of the PFLP for Southern California and Arizona. The attached photographs reflect OBEID attending and participating in a variety of PFLP sponsored events.

The PFLP is a MARXIST-LENINIST INTERNATIONAL TERRORIST ORGANIZATION whose leaders have avowed to overthrow the United States and other constitutional governments, by utilizing violent unconstitutional means. The Secretary General of the PFLP, GEORGE HABASH has made statements to United States news personnel that the PFLP will carry out violent attacks against United States persons within and outside the borders of the United States. OBEID's support of the PFLP fund

raising activity aids and abets the PFLP terror network.

AYMAN OBEID has been observed meeting with HAMIDE (supra) and assisting in PFLP events since May 1984 when a physical surveillance observed a male Arab matching OBEID's description meeting HAMIDE at HAMIDE's residence.

On February 23, 1985, AYMAN OBEID was observed and photographed (see attached photographs) assisting in setting up and participating in the ceremonies of a PFLP fund raiser held at St. NICHOLAS CATHEDRAL in Los Angeles, California. KHADER HAMIDE (supra) was in charge of setting up the fund raiser and acted as the Master of Ceremonies. MUDAR YAGHI, a PFLP leader in the United States, was the guest of honor.

OBEID partook in the entrance ceremony by carrying the flag of the PFLP (see photographs). OBEID is a member of a dance troupe known as "DABKE". THE DABKE group is/was made up

This document contains neither recommendation nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

AYMAN MUSTAFA OBEID

of AMJAD OBEID, AYMAN OBEID, SULEIMAN SHIHADDEH, AIAD BARAKAT and NAIM SHARIF. The OBEIDS, SHIHADDEH, BARAKAT and SHARIF are known cadre members of the PFLP. SHIHADDEH was recently deported from the United States to Jordan earlier in 1986 for being a subversive in the PFLP.

SHIHADDEH was stopped by UNITED STATES CUSTOMS AND IMMIGRATIONS returning from

Damascus, Syria. SHIHADAH had attended the first annual conference of the PALESTINE YOUTH ORGANIZATION (PYO). The PYO is a PFLP front organization for PFLP members 30 years old or younger. SHIHADAH was attempting to reenter the United States and had in his possession a PFLP identification card, identifying him as a "Combatant".

During the fund raiser of February 23, 1985, OBEID and the other males participating in the entry ceremony were dressed in military fatigues. The mood of the fund raiser as well as analysis of the speeches given by HAMIDE, NADA KRAYEM and MUDAR YAGHI were all anti-peace, and anti-negotiation with the United States, Israel, and Jordan. A reasonable person attending the fund raiser would conclude the fund raiser was not for raising money for humanitarian causes but to aid the PFLP in its objective of violence, against constitutional forms of governments. A video cassette tape, (not attached) was obtained of the fund raiser. The video tape depicts HAMIDE, NADA KRAYEM, and MUDAR YAGHI giving their speeches. It also depicts AMJAD OBEID, AYMAN OBEID, SULEIMAN SHIHADAH, AIAD BARAKAT and NAIM SHARIF dancing. MICHEL SHEHADAH is also on the video tape.

On March 26, 1985, a physical surveillance of a demonstration at the Israeli Consulate in Los Angeles observed and photographed AYMAN OBEID participating in the demonstration with KHADER HAMIDE (supra). Anti-American slogans were carried by members of the PFLP. The demonstration protested the Israeli invasion of Lebanon. OBEID is in the United States as a guest, on a F-1 Student Visa. His protesting against United States Foreign Policy with the PFLP, which advocates the overthrow of the United States government, is assumed to be against his visa status.

On June 9, 1985, a physical surveillance at the VETERANS OF FOREIGN WARS (VFW) hall in San Bernardino, California observed and photographed a PFLP sponsored fund raiser (see attached photographs). AYMAN OBEID was observed assisting in setting up the fund raiser. JAMAL NISER, United States leader of the PFLP was the guest of honor. HAMIDE (supra) was responsible for putting on the event.

AYMAN MUSTAFA OBEID

On February 15, 1986, a physical surveillance at the Glendale Civic Auditorium in Glendale, California observed and photographed the setting up/of an actual PFLP fund raiser (see attached photographs). Approximately 1200 people attended and an estimated \$80,000 to \$130,000 was raised for the PFLP. OBEID assisted in setting up the fund raiser and partook in the ceremonies. During the fund raising portion, OBEID was observed and photographed collecting the money from the attendees.

The Federal Agents observing the fund raiser did not speak or understand the Arabic language, however, from the posters of Palestinians with AK-47 assaults rifles, and the general mood or tone of the speeches, the agents realized the PFLP was not attempting to raise money for a humanitarian cause. The music and entire mood of the fund raiser from the entrance ceremony through the speeches sounded militaristic. The resulting translations of some of the speeches and the translation of the distributed written leaflets and brochures were all anti-peace, anti-United States peace settlement, anti-Jordanian peace settlement and anti-Israel.

Analysis of the telephone toll records of KHADER HAMIDE, the PFLP leader in Southern California and Arizona reflect that he is in constant contact with

OBEID. From observation at the aforementioned activities of the PFLP, it can be concluded that OBEID is a comrade or PFLP cadre member.

The following descriptive information has been determined about OBEID:

Name	AYMAN MUSTAFA OBEID
Aka	Ayman Obeid
Date of birth	February 9, 1962
Place of birth	Kuwait
Country of	
Citizenship	Jordan
Nationality	Palestinian
Sex	Male
Hair	Brown
Eyes	Brown
Height	6'0"
California Driver's	
License Number	C 1010931
Address as of	
12/9/85	4328 Albury Street
	Long Beach, California
Telephone	(213) 597-3273
Vehicle License	
Numbers	4P6302
	062 UDW

AYMAN MUSTAFA OBEID

Occupation	Student, junior undergraduate program CALIFORNIA STATE UNIVERSITY LONG BEACH Civil Engineering
Admission Number	995-03637325
Brother	AMJAD MUSTAFA OBEID
Other Address	1628 East 1st Street #2 Long Beach, California

Attached hereto are photographs referred to above.

FBI Memorandum on Bashar Amer

U.S. Department of Justice
Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Los Angeles, California

January 14, 1987

BASHAR HUSAM AMER, aka
Basha Amer, Bashir Amer;
INTERNATIONAL TERRORISM -
POPULAR FRONT FOR THE LIBERATION OF
PALESTINE (PFLP)

The investigation of BASHAR AMER was predicated on information that he was involved in the PFLP and was a close associate and comrade to KHADER MUSA HAMIDE, the PFLP leader in Southern California and Arizona.

The PFLP is a MARXIST LENINIST INTERNATIONAL TERRORIST ORGANIZATION whose leaders advocate the overthrow of the United States, Israel and other forms of legal governments through violent, unconstitutional and illegal means. The Secretary General of the PFLP, GEORGE HABASH, has advised U.S. News personnel that the PFLP will carry out violent attacks against U.S. citizens within and outside the borders of the United States.

The attached photographs depict AMER actively involved in PFLP functions which include demonstrations and fund raisers. Documents taken from the PFLP leader in the U.S., give evidence that the leaders of the PFLP are responsible for the overt and

covert cells. AMER is a leader of the PFLP in the Riverside/ San Bernardino, California areas, and, therefore, is presumed to be aware of those secret and overt cells and the objectives of those cells.

On September 28, 1984, the PFLP held a fund raiser at ST. ANNE'S MELEKITE CHURCH, North Hollywood, California. AMER assisted in the organization of the fund raiser.

This document contains neither recommendations nor conclusions of the FBI. It is the property of the FBI and is loaned to your agency; it and its contents are not to be distributed outside your agency.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

The fund raiser began at 7:00 p.m. It was announced at the fund raiser that \$2,100.00 (U.S.) was collected from donations and 400 tickets had been sold at \$10.00 per person or \$7.00 per student. Approximately 250 people attended the fund raiser. It was estimated that a total of approximately \$6,100.00 (U.S.) was collected. The collected money was given to PIERRE ALWAN, the President of "U.S. OMEN, SOUTH BAY CHAPTER". U.S. OMEN stands for United States Organization for Medical and Educational Needs. U.S. OMEN presently collects the funds for the PFLP and is well aware that the funds are not for humanitarian causes.

HAMIDE was the individual primarily responsible for setting up the fund raiser. Banners over the stage and the topic of the primary keynote speaker, HABIB SADEK, disclosed the fund raiser was for the LEBANESE NATIONAL RESISTANCE FRONT (LNRF). Photographs of HAMIDE'S wife, JULIE MUNGAI, and BASHAR AMER, and HAMIDE selling PLFP material were obtained as well as photographs

of the banners over the stage. These photographs are attached to this document.

As explained by SADEK, the LNRF is a loosely organized group of young Arabs located mostly in Southern Lebanon, who attempt to kill Israelis whenever or where ever they can. The LNRF has no formal headquarters or command structure and, therefore, relies upon the assistance of other organized groups to assist them financially, etc. SADEK is known in the Arab community as a member of the COMMUNIST PARTY OF LEBANON (CPL). SADEK is alleged to have run for the Lebanese Parliament on or about 1976 on the platform of the CPL.

HAMIDE was the second speaker at the fund raiser. HAMIDE discussed the coalition between the PFLP and DEMOCRATIC FRONT FOR THE LIBERATION OF PALESTINE (DFLP), the November 29, Committee for Palestine and the centralized leadership established for the NATIONAL LIBERATION OF PALESTINE.

On February 23, 1985, a surveillance at St. NICHOLAS CATHEDRAL observed and photographed numerous individuals setting up another PFLP fund raising event. AMER was observed and photographed setting up the event.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

The following individuals were also observed and photographed setting up the event:

BASHAR AMER, PFLP leader in the Riverside/ San Bernardino, California area,
AIAD KHALED BARAKAT, PFLP member in the Los Angeles area,
MICHAEL SHEHADEH, PFLP subordinate leader in the Los Angeles area, * * *

AMJAD OBEID, PFLP cadre member in the Los Angeles area,
AYMAN OBEID, PFLP cadre member in the Los Angeles area,

* * * * *

NAIM SHARIF, PFLP cadre member in the Los Angeles area,

* * * * *

JULIE MUNGAI, wife of HAMIDE,

* * * * *

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

Approximately 800 to 1000 individuals attended the fund raiser.

Approximately 25 women from the PFLP Women Auxillary from San Diego and Los Angeles assisted in preparing the food and other activities for the fund raiser.

The total amount of money collected was not announced, however, HAMIDE and his assistant, MICHAEL SHEHADEH, was observed collecting the money and carrying it into the lower level of the cathedral auditorium. During the fund raising portion of the event, announcements were made that U.S. OMEN was collecting the funds and that the donations were tax deductible.

When the PFLP contingent from the Riverside, California, area arrived at the fund raiser, they were seated at the head table by HAMIDE. HAMIDE had several other guests at the fund raiser give up their seats at the head table in order to seat the Riverside PFLP contingent.

Individuals from Riverside, San Diego, San Francisco, and Fresno, California as well as the states of Arizona and Texas attended the fund raiser.

Approximately sixty (60) ushers assisted the guests in parking as well as assisting in the program of events. The ushers wore red rectangular badges with the PFLP symbol and arabic writing denoting the PFLP on it. The parking attendants wore red arm bands.

MUDAR YAGHI, a PFLP leader in the U.S., was one of the keynote speakers. HAMIDE and NADA KRAYEM were the other two speakers. KRAYEM represented the LEBANESE NATIONAL RESISTANCE FRONT (LNRFF). * * * Just prior to when YAGHI took the podium, it was announced that no photographs would be allowed. When the guests protested this announcement, HAMIDE advised that the entire event and the speeches were being video taped and that the video tape would be available to those desiring to view it. A copy of that video tape was subsequently obtained. * * * HAMIDE'S speech was anti-U.S., anti-Jordan, and Anti-Israel.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

The tickets sold to those attending the fund raiser were identical to tickets sold for prior PFLP fund raisers. The front of the ticket contained the PFLP symbol. The inside of the ticket contained the date, time, address and other information about the fund raiser. Raffle tickets were also sold at the fund raiser. Copies of these two (2) tickets are included in the attachment section of this document.

The following sets forth specifics about the printed material that was distributed at the fund raiser:

A letter entitled "THE PALESTINIAN NATIONAL SALVATION FRONT (PNSF) Political Program". This letter speaks out against the PALESTINE LIBERATION ORGANIZATION leadership of YASIR ARAFAT and his attempts to negotiate a peaceful settlement. It also speaks against the U.S. peace efforts and the possibilities of foiling these schemes. It sets forth the political tasks and organizational principals of the PNSF. It speaks against the Jordianian and Egyptian attempts for a negotiated resolution to the Palestinian problem. The last paragraph of the letter sets forth what the fund raiser was also for: "We consider the United States of America as our first and foremost enemy to our people, and to all the revolutionary forces in the world, . . . ; therefore, we should strengthen our international front against the U.S. policy and against its interests all over the world . . . REVOLUTION UNTIL VICTORY".

A printed speech by the PFLP Secretary General GEORGE HABASH was also distributed at the fund raiser. HABASH admits in the letter that the PFLP established the PNSF to topple the AMMAN agreement which was supported by the U.S.

A statement issued by the "The Supporters of the PALESTINE NATIONAL SALVATION (PNSF)" was also distributed at the fund raiser. This statement is anti-U.S., anti-Jordan, and anti-Israel.

It is apparent from its documents that the PFLP does not advocate peace and negotiation but only violence and military actions. The fund raiser was collecting money to support such violent activity and those in attendance had little doubt that their donated money was going to be utilized to fund killing and maiming instead of being used for humanitarian purposes.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

On March 26, 1985, a physical surveillance of a demonstration at the ISRAELI CONSULATE in Los Angeles, California, observed and photographed (see attached photographs) AMER participating in the demonstration, and meeting with KHADER HAMIDE (supra). The demonstration was to protest the Israeli occupation of Lebanon. The photographs speak for themselves in describing the relationship between HAMIDE and AMER.

On June 9, 1985, the PFLP held a fund raiser at the VETERANS OF FOREIGN WARS (VFW) Hall in San Bernardino, California. HAMIDE was the keynote speaker at the event. The fund raiser was organized by PFLP cadre leaders from Riverside. The VFW Hall was rented under the name of the ARAB AMERICAN CULTURE CLUB.

A surveillance at the fund raiser determined that JAMAL NISER, PFLP leader in the U.S., was the primary celebrity at the fund raiser. Prior to the fund raiser beginning, NISER stood outside the VFW Hall and met the arriving guests.

Approximately 400 persons attended the fund raiser.

The tickets being sold had the following printed in Arabic:

Front: "POPULAR FRONT FOR THE LIBERATION OF PALESTINE" and PFLP symbol.

Inside: "The revolution is continuing for the purpose of . . . support of the PALESTINE NATIONAL SALVATION FRONT (PNSF) to topple the Amman accord. Struggling escalate all means of confronting the Zionist enemy and his designs in the occupied territory and Lebanon. Struggling for the

structure of the tripartite national steadfastness - Palestinian - Lebanese - Syrian - for confronting hostile plights". "The committee of Democratic Palestine invites you" . . .

BASHAR HUSAM AMER;
INTERNATIONAL TERRIORISM - PFLP

Photographs of HAMIDE and those individuals who assisted in setting up the event are in the attachment section of this document. The following individuals were observed and photographed assisting in setting up and attending the fund raiser:

AIAD KHALED BARAKAT, PFLP member in Los Angeles,

* * * * *

AYMAN OBEID, PFLP member in Los Angeles,
 AMJAD OBEID, PFLP member in Los Angeles,

* * *

BASHAR AMER, PFLP leader in San Bernardino,

* * * * *

KHADER MUSA HAMIDE, PFLP leader in Los Angeles,

* * * * *

On February 15, 1986, the PFLP held a fund raiser at the GLENDALE CIVIC AUDITORIUM, Glendale, California. A surveillance at the GLENDALE CIVIC AUDITORIUM observed the following activities and individuals:

Photographs of individuals assisting and attending the fund raiser as well as copies of the speeches and printed material distributed at the fund raiser are included in the attachment section of this document. AMER assisted in preparing and participated in the event.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

At approximately 12 noon, about 12 Arab men and women entered the auditorium. An individual called "AYMAN" by his colleagues and who was subsequently identified as AYMAN OBEID removed the flag of the United States and of the State of California from their positions on the stage of the auditorium to a place in the back of the stage area.

Numerous posters depicting Palestinians with AK-47 assault rifles and other implements of war were posted throughout the auditorium. Also posted throughout the auditorium were long white banners with black Arabic writing on them.

At approximately 3:49 p.m. JABR EL-WANNI, West Coast Regional leader of the PFLP, arrived at the auditorium. EL-WANNI was the guest of honor and keynote speaker at the fund raiser.

The following individuals were observed and photographed assisting in the fund raiser:

* * *

AYMAN OBEID, PFLP member,
 AMJAD OBEID, PFLP member,

* * *

MICHAEL SHEHADEH, PFLP leader,
 KHADER MUSA HAMIDE, PFLP leader,
 JULIE MUNGAI, PFLP supporter,

* * * * *

NAIM SHARIF, PFLP member,

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

* * * * *

BASHAR AMER, PFLP leader,

* * * * *

The stage contained a large flag of the PLO measuring approximately twelve (12) feet by eighteen (18) feet. The podium was to one side of the stage with a picture of PFLP Secretary General GEORGE HABASH hung from it and the PFLP symbol hung below HABASH'S picture. A second picture of HABASH was hung on the wall next to the podium. The front of the stage was decorated with PLO and PFLP flag as well as with braided ribbon in the colors of the PLO flag. A small PLO flag placed in a standard was opposite the podium.

Long tables with the capacity for seating 800 people for dinner were positioned on either side of a wide aisle that ran down the center of the auditorium. On each table was a white table cloth made of white paper. The table cloth had a ribbon in the colors of the PLO flag running down the length of it. Each table had a red cutout of the PFLP symbol placed in a stand at each end. Each place setting contained a red placemat, a napkin, and eating utensils, along with a program and several leaflets.

The fund raiser began with an entrance ceremony. The house lights were dimmed and several PFLP cadre members marched into the auditorium from the doors at the rear of the auditorium. The entrants proceeded up the center aisle of the auditorium and onto the stage. During the entrance ceremony, what

sounded like nationalistic music was played. A slide show depicting Middle East looking people, presumed to be Palestinians was shown. Some of the males involved in the entrance ceremony wore military fatigues. The women involved in the entrance ceremony wore traditional Palestinian dresses, however, one woman wore fatigues.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

SUHAD JABER (supra) carried the PLO flag. AIAD BARAKAT, BASHAR AMER, AMJAD OBEID, AYMAM OBEID, MAY BARB, ORAIB BOSTAMI, SAMIR HO-HAMMAD, KHADER HAMIDE, JABER EL-WANNI, HASSAN KRAYEM, and MICHEL SHEHADEH were also part of the entrance ceremony. In all, approximately twenty-five (25) people partook in the entrance ceremony. JABER EL-WANNI, SUHAD JABER, and MICHEL SHEHADEH were the main speakers at the fund raiser. HAMIDE, VICTOR DABBAH, and PIERRE ALWAN were the primary individuals who collected the money during the fund raising portion of the event. HASAN KRAYEM, and AMJAD OBEID collected money from the audience. MICHEL SHEHADEH assisted in collecting the money on the stage. HAMIDE, ALWAN, and/or DABBAH would obtain the money or pledge from an assistant on the floor of the auditorium and hand it to an unknown male seated at a table on the stage. The unknown male appeared to make an entry into a ledger. A large fat unidentified male was also on the stage announcing the name and the amount the individual donated or pledged.

Estimates of the number of people who attended the fund raiser ranged from 800 to 1200 people. The event was very well orchestrated. It was obvious to the observers that HAMIDE was in charge of setting up the event and seeing that it was run according to plan. Estimates of the amount of money recieved at the fund raiser varied from approximately \$30,000.00 to \$130,000.00 (U.S.). During the fund raiser, HAMIDE was seen making notations in a ledger or note book

that he kept with him at all times. To a reasonable person at the fund raiser, it was evident that the fund raiser was not being held for humanitarian reasons but for support of PFLP violence.

The fund raiser was advertised several weeks prior to being held on ARAB AMERICAN TELEVISION. The advertisement showed the PFLP symbol and explained that the PFLP was holding its annual fund raiser at the GLENDALE CIVIC AUDITORIUM.

AMER is in the United States on a student F-1 visa. AMER is currently enrolled at CHAFFEY COMMUNITY COLLEGE, 5885 Haven Avenue, Alto Loma, California.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

The following is a listing of credits AMER has received while studying at CHAFFEY:

FALL 1985

General Chemistry	C
Introduction/Fine Arts	C
History of the U.S.	D
Intermediate Algebra	F

WINTER 1986

General Chemistry & Lab	Withdrew
Organic Chemistry & Lab	Withdrew
PNN: Macroeconomics	Withdrew
Intro to Psychology	C

SPRING 1986

General Chemistry & Lab	Withdrew
Composition	B
History of U.S.	D
Intermediate Algebra I	B

FALL 1986

Work in progress

College Physics I & Lab
 History of the U.S.

From AMER'S activities and involvement in the PFLP it is obvious that he is devoted to the PFLP and not the United States.

On March 20, 1986, a physical surveillance of AMER determined that he is employed at the RANCHO MARKET, 1610 North Rancho, Colton, California. The market is owned by ALI M. YASIN a known leader of

the PFLP in Riverside/San Bernardino, California area. Further, at approximately 10:00 p.m. it was observed that AMER and several other Arab males entered AMER'S former residence 795 West Citrus, Colton, California, for a meeting.

BASHAR HUSAM AMER;
INTERNATIONAL TERRORISM - PFLP

AMER is identified as follows:

Name:	BASHAR HUSAM AMER
Aliases:	Bashar H. Amer Bashar Amer Bashir Amer
Date of Birth:	April 28, 1962
Place of Birth:	Al-Birna, Jordan
Nationality:	Jordanian
U.S. Immigration Number:	A 27-572-307
Employment:	Rancho Market 1610 North Rancho Colton, California
Sex:	Male
Weight:	160 pounds
Height:	5'10"
Hair:	Red

DECLARATION OF DAVID COLE

1. I am counsel for plaintiffs in American-Arab Anti-Discrimination Committee v. Reno.

2. I execute this declaration for three purposes: (1) to establish that there were similarly situated others in Los Angeles whom the INS has not sought to deport; (2) to explain what has happened to date in Hamide and Shehadeh's deportation hearing; and (3) to submit two documents referred to in plaintiffs' Reply.

3. The asylum files turned over to plaintiffs in discovery in this matter (and which are under protective order) included at least six aliens in the Los Angeles area whom the INS knew were members and/or supporters of the Nicaraguan Contras, yet whom the INS did not seek to deport.

4. No. A28 821 729 was a member of the contras, and claimed that he was responsible for enlisting members in the contra organization. He entered the United States in January 1986 on a visitor's visa, and therefore his authorized stay in the United States expired in 1986. He applied for asylum in June 1987. His asylum application was denied, yet the INS did not seek his deportation.

5. No. A23 727 457 was a member of the Misura group, and was a Contra supporter. His authorized stay in the United States expired in November 1985. He applied for asylum in September 1987. His asylum application was denied, yet the INS did not seek his deportation.

6. No. A28 742 043 was a member of and an undercover agent for the contras. His authorized stay in the United States expired in March 1984. He applied

for asylum in August 1987. In August 1989, the INS notified him of its intent to deny his asylum application, but the last dated action in his file is an extension of employment authorization, dated December 1990.

7. No. A28 950 597 provided transportation and carried propaganda for the contras from 1982-86. His authorized stay in the United States expired in May 1987. He applied for asylum in November 1987. In June 1990, the State Department recommended that his application be denied. The last dated action in his file is an extension of employment authorization, dated October 1990.

8. No. A28 953 646 was an active collaborator with the contras. His authorized stay in the United States expired in June 1984. He applied for asylum in October 1987. The INS sent him a Notice of Intent to Deny his application. The last dated action in his file, however, is a request for a new interview on May 4, 1990.

9. No. A23 727 037 was an active member and supporter of the contras. His authorized stay expired in October 1983. He applied for asylum in September 1987, and was denied asylum by an undated letter. The last dated action in his file is an interview dated September 10, 1990, in which the INS officer recommended that the application be denied.

10. As demonstrated by the Declaration of Karina Dimidjian, the bulk of the files the INS turned over in response to this Court's initial discovery order were not responsive, in that they did not include members of the Contras, Mujahedin, RENAMO, or anti-Castro Cuban groups. In addition, most of the files the INS

turned over were from the Miami office. Accordingly, there were relatively few files from the Los Angeles office.

11. If the Court believes that it needs further evidence from the Los Angeles district, plaintiffs believe it would be appropriate to order disclosure of asylum files for persons associated with the Nicaraguan contras, Afghanistan Mujahedin, RENAMO, and anti-Castro Cuban groups opened in 1982 through 1985. These files would presumably include more instances of individuals whose asylum applications had been denied by 1987.

12. The immigration proceedings involving Hamide and Shehadeh—the entire transcript of which defendants have submitted as evidence—have to date focused exclusively on the INS's effort to establish that the PFLP is a "terrorist organization." None of the evidence or testimony to date has concerned plaintiffs, because the government chose to bifurcate the proceedings and first submit all its evidence on the PFLP. With the exception of one dubious incident in Texas, in which a man convicted of bank fraud was reported to have bragged in a bar to being a member of the PFLP, all of the testimony concerns alleged PFLP activity abroad.

13. None of the evidence or testimony provided at the immigration hearing is first-hand. It consists of two hired professors (Ariel Merari and Paul Wilkinson) who based their testimony on their reading of news articles, magazines and books that mention the PFLP. The professors admitted that they did no first-hand investigation and relied on no first-hand knowledge for their testimony. Ariel Merari, one of the professors, stated that while serving in the

Israeli military he had witnessed one of the incidents about which he testified, but he refused to identify which one, and refused to answer any questions about this on cross-examination, claiming that he could not provide any information from his military service.

14. As counsel for Hamide and Shehadeh, we objected to the admission of the professors' testimony on hearsay grounds, but the judge permitted the testimony, reasoning that the Federal Rules of Evidence do not apply in deportation hearings.

15. Attached as Exhibit A is a portion of the transcript from the August 16, 1995 hearing in this matter.

16. Attached as Exhibit B is a portion of defendants' Brief for Appellants from the recent Ninth Circuit appeal in this matter.

I, DAVID COLE, hereby declare that the foregoing is true and correct to the best of my knowledge, information, and belief.

DATED: March 18, 1996

/s/ DAVID COLE
DAVID COLE

Excerpts from August 16, 1995 Transcript

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-2107 SVW

-o0o-

HONORABLE STEPHEN V. WILSON, JUDGE PRESIDING

-o0o-

AMERICAN ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL., PLAINTIFF

vs.

JANET RENO, DEFENDANT

Los Angeles, California

Wednesday, August 16, 1995

Carmelita E. Lee
Official Court Reporter
402 United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 680-2355

* * * * *

Secondly, even if there was some investigation afterwards that might shed light on the fact of the initial intent.

An example—I can give you an example, Your Honor, of that.

In the submission to us in discovery, one of the things the government produced was a translation of a tape at an event. I think it occurred in 1985, but it was certainly before the prosecution. And the translation was allegedly concerning a speech that an individual, not any of the plaintiffs, but another individual, gave at the event.

Now, the government has provided a written translation of that. We want the tape itself, which is in the possession of the government. The government has refused to produce what tape on the theory that, well, this was something that an FBI agent had, and that wasn't turned over to the INS, and the INS didn't

—
THE COURT: I was just getting into that.

The other subject is the government's position that the only documents that it feels it has to turn over are those that are in the INS' possession, and not in the possession of the FBI or the Justice Department.

But what if there are documents dealing with the decision to deport that are in the possession of the FBI or the Department of Justice? Why should those documents not be turned over?

MR. LINDEMANN: The decision to deport, Your Honor, and a search was done of the documents, and

the government and Justice Department generally, as the FBI, Immigration Service, but with respect to the decision to charge, that decision was an INS decision.

We have produced all of the materials that INS had at hand when it made that decision. Things that the INS never saw could have no bearing on the INS' decision to prosecute.

THE COURT: I know, but it seems as though there was some discussion beyond the INS on this question, wasn't there?

MR. LINDEMANN: Well, when you say some discussion —

THE COURT: I mean as to whether to charge, didn't the INS discuss the matter with the FBI or the Justice Department?

MR. LINDEMANN: No.

There was an early meeting that was described in the response that deals with—and we have identified those individuals who were participating in that meeting—and it dealt generally with the subject of what kinds of charges are available with respect to the immigration statute. This was an FBI and INS meeting. The particulars of this specific case in Los Angeles and anywhere else were not thrown to the table for purposes of discussion.

THE COURT: Are you telling me that there are no documents in the possession of the FBI or Justice Department which reflect upon the decision to deport these people?

MR. LINDEMANN: Your Honor, you have them all.

THE COURT: You mean the plaintiff has them all?

MR. LINDEMANN: Well, with the exception of the privilege documents that we have been discussing.

THE COURT: So you're saying there are no others.

MR. LINDEMANN: To our knowledge, there are no others, Your Honor.

THE COURT: That's what they say.

MR. VAN DER HOUT: Well, Your Honor, there is a couple of points.

One is the Gustafson declaration, and other things we previously submitted to the Court state that the FBI was intimately involved in this, not just one meeting early on. Gustafson says that the FBI was involved right up to the charging of this, and then as a matter of fact, there was the FBI—he states in here, he goes through this incident where the FBI demanded the files from him in the middle of a prosecution.

THE COURT: I know, but there is a difference perhaps, between the involvement of the FBI for purposes of * * *.

JUL 16 1998

OFFICE OF THE CLERK

(5)
No. 97-1252

In the Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ET AL., PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
*Solicitor General
Counsel of Record*

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
*Assistant to the Solicitor
General*

DOUGLAS N. LETTER
*Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217*

QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

PARTIES TO THE PROCEEDINGS

The following Department of Justice officials are petitioners in this Court and were appellants in the court of appeals and defendants in the district court: Janet Reno, Attorney General; Harold Ezell; C.M. McCullough; Doris Meissner, Commissioner, Immigration and Naturalization Service (INS); Ernest E. Gustafson, personally and in his capacity as former District Director of the INS; Richard K. Rogers, District Director, personally and in his capacity as District Director of the INS; Gilbert Reeves, personally and in his capacity as an officer of the INS. The INS itself was also a defendant in the district court and an appellant in the court of appeals, and is a petitioner in this Court. The following were plaintiffs in the district court and appellees in the court of appeals, and are respondents in this Court: American-Arab Anti-Discrimination Committee; Bashar Amër, Aiad Barakat; Khader Musa Hamide; Nuangugi Julie Mungai; Amjad Obeid; Ayman Mustafa Obeid; Naim Sharif; Michel Ibrahim Shehadeh.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	16
Argument:	
The courts below lacked jurisdiction to consider respondents' constitutional challenge to the filing of deportation charges prior to the entry of a final order of deportation	19
A. Even before the enactment of IIRIRA, judicial review of the filing of deportation charges was unavailable prior to the entry of a final order of deportation	20
B. IIRIRA precludes judicial review of respondents' selective enforcement claims prior to the entry of a final order of deportation	25
C. Deferral of respondents' selective enforcement challenge until the entry of a final order of deportation would not violate the Constitution	34
Conclusion	50
Appendix	1a

TABLE OF AUTHORITIES

Cases:

<i>Almendarez-Torres v. United States</i> , 118 S. Ct. 1219 (1998)	32, 36
<i>Auguste v. Reno</i> , 140 F.3d 1373 (11th Cir. 1998) ...	29, 30
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986)	36, 37
<i>Cameron v. Johnson</i> , 390 U.S. 611 (1968)	39, 41
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	41

IV

Cases—Continued:

	Page
<i>FDIC v. Meyer</i> , 510 U.S. 471 (1994)	25
<i>FTC v. Standard Oil Co. of California</i> , 449 U.S. 232 (1980)	23, 24, 35, 39
<i>Fiallo v. Bell</i> , 430 U.S. 787 (1977)	40
<i>Foti v. INS</i> , 375 U.S. 217 (1963)	21
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	42
<i>Galvan v. Press</i> , 347 U.S. 522 (1954)	39
<i>Goncalves v. Reno</i> , No. 97-1953, 1998 WL 236799, (1st Cir. May 15, 1998)	45
<i>Healy v. James</i> , 408 U.S. 169 (1972)	10
<i>Harisiades v. Shaughnessy</i> , 342 U.S. 580 (1952)	40
<i>Heikkila v. Barber</i> , 345 U.S. 229 (1953)	21
<i>Hose v. INS</i> , 141 F.3d 932 (9th Cir. 1998)	29, 45
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	22
<i>Jean-Baptiste v. Reno</i> , No. 97-6062, 1998 WL 228120 (2d Cir. May 8, 1998)	45
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972)	40
<i>Laird v. Tatum</i> , 408 U.S. 1 (1972)	43
<i>Lalani v. Perryman</i> , 105 F.3d 334 (7th Cir. 1997)	29, 30
<i>Lerma de Garcia v. INS</i> , 141 F.3d 215 (5th Cir. 1998)	45
<i>Lockheed Corp. v. Spink</i> , 116 S. Ct. 1783 (1996)	31
<i>Makonnen v. INS</i> , 44 F.3d 1378 (8th Cir. 1995)	47
<i>Massieu v. Reno</i> , 91 F.3d 416 (3d Cir. 1996)	22
<i>Massieu v. Reno</i> , 915 F. Supp. 681 (D.N.J. 1996)	22
<i>Mathews v. Diaz</i> , 426 U.S. 67 (1976)	39
<i>McGee v. United States</i> , 402 U.S. 479 (1971)	24
<i>McKart v. United States</i> , 395 U.S. 185 (1969)	24
<i>Middlesex County Ethics Comm. v. Garden State Bar Ass'n</i> , 457 U.S. 423 (1982)	35
<i>Osaghae v. INS</i> , 942 F.2d 1160 (7th Cir. 1991)	47
<i>Public Citizen v. United States Department of Justice</i> , 491 U.S. 440 (1989)	36
<i>Ramallo v. Reno</i> , 114 F.3d 1210 (D.C. Cir. 1997)	30, 45

V

Cases—Continued:

	Page
<i>Reno v. Catholic Social Servs., Inc.</i> , 509 U.S. 43 (1993)	11
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	40, 49
<i>Shalala v. Schaeffer</i> , 509 U.S. 292 (1993)	46
<i>Shaughnessy v. Pedreiro</i> , 349 U.S. 48 (1955)	21
<i>Shaughnessy v. United States ex rel. Mezei</i> , 345 U.S. 206 (1953)	40
<i>Stone v. INS</i> , 514 U.S. 386 (1995)	21, 46, 49
<i>United Savings Ass'n v. Timbers of Inwood Forest Assocs.</i> , 484 U.S. 365 (1988)	33
<i>United States v. Armstrong</i> , 517 U.S. 456 (1996)	48, 49
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	35
<i>United States v. Locke</i> , 471 U.S. 84 (1985)	36
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30 (1992)	25
<i>Waters v. Churchill</i> , 511 U.S. 661 (1994)	39
<i>Webster v. Doe</i> , 486 U.S. 592 (1988)	36
<i>Weinberger v. Hynson, Westcott & Dunning, Inc.</i> , 412 U.S. 609 (1973)	33
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	18, 24, 37, 38
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	35, 42, 44

Constitution and statutes:

U.S. Const.:	
Amend. I	2, 5, 13, 22, 40, 41, 42
Amend. V	5
Act of Oct. 11, 1996, Pub. L. No. 104-302:	
§ 2, 110 Stat. 3657	2
§ 2(1), 110 Stat. 3657	29
§ 2(2), 110 Stat. 3657	28-29
Administrative Procedure Act, 5 U.S.C. 551 et seq.	21, 23
5 U.S.C. 706	47

VI

Statutes—Continued:

Page

Antiterrorism and Effective Death Penalty Act of
1996, Pub. L. No. 104-132:

§ 302, 110 Stat. 1248	43
§ 440(a), 110 Stat. 1276	25
Declaratory Judgment Act, 28 U.S.C. 2201 <i>et seq.</i>	5
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 <i>et seq.</i>	19, 44
28 U.S.C. 2341-2351	20
28 U.S.C. 2344	28
28 U.S.C. 2347(a)	47
28 U.S.C. 2347(b)	45
28 U.S.C. 2347(b)(3)	9, 14, 19, 36, 44, 45, 46, 47, 48, 49
28 U.S.C. 2347(c)	46

Illegal Immigration Reform and Immigrant Re-
sponsibility Act of 1996, Pub. L. No. 104-

208, Div. C, 110 Stat. 3009-546	12
§ 306(a), 110 Stat. 3009-607	12, 14, 31
§ 306(c)(1), 110 Stat. 3009-612	2, 29, 30
§ 309(a), 110 Stat. 3009-625	26, 30
§ 309(c)(1), 110 Stat. 3009-625	2, 26, 30, 31
§ 309(c)(1)(B), 110 Stat. 3009-625	31
§ 309(c)(4), 110 Stat. 3009-625	2
§ 309(c)(4)(A), 110 Stat. 3009-626	26
§ 381(b), 110 Stat. 3009-650	5

Immigration and Nationality Act Amendments of
1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651

Immigration and Nationality Act, 8 U.S.C. 1101 <i>et seq.</i> :	21
8 U.S.C. 1101 note (Supp. II 1996)	29, 31
8 U.S.C. 1101 (Supp. II 1996)	
8 U.S.C. 1105a (1988)	2
8 U.S.C. 1105a (1994)	12, 16, 20, 21, 22, 23, 24, 25, 31, 46
8 U.S.C. 1105a(a) (1994)	9, 19, 20, 22, 25, 26, 44
8 U.S.C. 1105a(a)(1) (1994)	28
8 U.S.C. 1105a(a)(4) (1994)	47
8 U.S.C. 1105a(a)(10)	21, 25, 45

VII

Statutes—Continued:

Page

8 U.S.C. 1105a(b) (1994)	21, 26
8 U.S.C. 1105a(c) (1994)	9, 20, 26
8 U.S.C. 1151-1365	5
8 U.S.C. 1182(a)(3)(B)(iii)(IV)	7
8 U.S.C. 1189(a)(1) (Supp. II 1996)	43
8 U.S.C. 1221-1231	32, 33
8 U.S.C. 1221-1231 (Supp. II 1996)	33
8 U.S.C. 1229a (Supp. II 1996)	26
8 U.S.C. 1251(a)(6)	5, 7
8 U.S.C. 1251(a)(6)(D)	7
8 U.S.C. 1251(a)(6)(D) (1982)	4, 6
8 U.S.C. 1251(a)(6)(F)(ii) (1988)	7
8 U.S.C. 1251(a)(6)(F)(iii)	7
8 U.S.C. 1251(a)(6)(F)(iii) (1982)	5, 6
8 U.S.C. 1251(a)(6)(G)(v)	7
8 U.S.C. 1251(a)(6)(G)(v) (1982)	4, 6
8 U.S.C. 1251(a)(6)(H)	7
8 U.S.C. 1251(a)(6)(H) (1982)	4, 6
8 U.S.C. 1252 (Supp. II 1996)	2, 12, 17, 25, 26, 28, 29, 33, 46
8 U.S.C. 1252(a) (Supp. II 1996)	30
8 U.S.C. 1252(a)(1) (Supp. II 1996)	19, 25, 44, 47
8 U.S.C. 1252(a)(2)(B) (Supp. II 1996)	28
8 U.S.C. 1252(a)(2)(C) (Supp. II 1996)	28
8 U.S.C. 1252(b) (Supp. II 1996)	30
8 U.S.C. 1252(b)(1) (Supp. II 1996)	28
8 U.S.C. 1252(b)(4)(A) (Supp. II 1996)	47
8 U.S.C. 1252(b)(9) (Supp. II 1996)	17, 27, 28, 33, 34, 45, 48
8 U.S.C. 1252(d) (Supp. II 1996)	26
8 U.S.C. 1252(f) (Supp. II 1996)	14, 17, 31, 32, 33
8 U.S.C. 1252(f)(1) (Supp. II 1996)	32, 33, 34
8 U.S.C. 1252(g) (Supp. II 1996)	12, 13, 14, 16, 27, 28, 29, 30, 31, 34, 45, 48
8 U.S.C. 1255a	11
8 U.S.C. 1329 (1988)	5
8 U.S.C. 1329 (Supp. II 1996)	5

VIII

Statutes—Continued:	Page
Immigration Reform and Control Act, Pub. L. No. 99-603, § 201(a), 100 Stat. 3394	11
International Emergency Economic Powers Act, 50 U.S.C. 1701 <i>et seq.</i>	43
18 U.S.C. 2339B(a)(1) (Supp. II 1996)	43
18 U.S.C. 2339B(c) (Supp. II 1996)	43
28 U.S.C. 1331	5, 25
28 U.S.C. 1361	5, 25
28 U.S.C. 2201 <i>et seq.</i>	5, 25
28 U.S.C. 2241	45
42 U.S.C. 405(g)	37, 46
42 U.S.C. 405(h)	37, 38
42 U.S.C. 1983	41
Miscellaneous:	
60 Fed. Reg. 5079 (1995)	43
61 Fed. Reg. 1695 (1996)	43
62 Fed. Reg. (1997):	
p. 3439	43
p. 52,650	43
63 Fed. Reg. 3445 (1998)	43
H.R. Rep. No. 1086, 87th Cong., 1st Sess. (1961)	21, 25

In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1252

JANET RENO, ET AL., PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 119 F.3d 1367. The opinions of the district court (Pet. App. 22a-43a, 44a-76a) are unreported. Earlier opinions of the court of appeals in this case (Pet. App. 77a-128a, 166a-187a) are reported at 70 F.3d 1045 and 970 F.2d 501. An earlier opinion of the district court (Pet. App. 188a-245a) is reported at 714 F. Supp. 1060. Three other earlier opinions of the district court (Pet. App. 129a-137a, 138a-150a, 151a-165a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 10, 1997. A petition for rehearing was denied on December 23, 1997. Pet. App. 246a-252a. The petition for a writ of certiorari was filed on January 30, 1998, and was granted on June 1, 1998, limited to the question whether the courts below had jurisdiction over this case. 118 S. Ct. 2059. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are set forth as an appendix to this brief: the First Amendment to the United States Constitution; 8 U.S.C. 1105a (1988); 8 U.S.C. 1252 (Supp. II 1996); Sections 306(c)(1) and 309(c)(1) and (4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, 3009-625 to 3009-627, as amended by the Act of October 11, 1996, Pub. L. No. 104-302, § 2, 110 Stat. 3657; and the relevant section of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2347.

STATEMENT

1. In January 1987, the Immigration and Naturalization Service (INS) charged eight aliens in Los Angeles with deportability based on their activities on behalf of the Popular Front for the Liberation of Palestine (PFLP), a Middle Eastern terrorist organization violently opposed to United States policies and interests.¹ Those aliens are respondents in this

¹ From its founding in 1967, the PFLP has proclaimed the United States to be one of its principal enemies, along with the State of Israel and the governments of various moderate Arab

Court. Two of the respondents (Khader Hamide and Michel Shehadeh) are permanent resident aliens; the other six (Bashar Amer, Aiad Barakat, Julie Mungai, Amjad Obeid, Ayman Obeid, and Naim Sharif) were in this country under temporary visas for studying or visiting.

Evidence introduced by the government in this case showed that respondent Hamide had come to the attention of the Federal Bureau of Investigation (FBI) as a result of investigative activities conducted by a task force considering possible terrorist threats to the 1984 Los Angeles Olympic Games. C.A. E.R. 3-

States. Among its many acts of international terrorism, the PFLP hijacked five aircraft in one weekend in 1970, killed 16 United States citizens at Israel's Lod Airport in 1972, assassinated the United States Ambassador to Lebanon in 1976, and conducted a campaign of attacks against moderate Palestinian officials during the mid-1980s, including assassinations. The organization strenuously opposed the United States in the Gulf War with Iraq. In 1991, on the eve of a comprehensive peace conference in Madrid between Israel and neighboring Arab countries, the PFLP machine-gunned a West Bank passenger bus, injuring five children and killing their mother and the bus driver. The PFLP remains one of the rejectionist terrorist groups violently opposed to the peace process sponsored by the United States in the Middle East. C.A. E.R. 216-219, 230-241.

Evidence introduced by the government in this case demonstrated the extensive nature of the PFLP's activities in the United States. Internal documents seized from the PFLP's U.S. leaders in 1983 and 1984 revealed that the group had established secret cells in this country, which had military capability and were awaiting orders from PFLP headquarters in Syria. The FBI also discovered that the PFLP has developed and controls a substantial infrastructure in the United States. A principal activity of that infrastructure is concerted fundraising for PFLP operations abroad. C.A. E.R. 13-17, 81-93, 185-190, 212.

6. Utilizing confidential sources, leads from other FBI offices, and covert surveillance, the FBI and INS established that Hamide was organizing fundraising events on behalf of the PFLP at which money was solicited for the stated purpose of supporting the organization's "fighters." *Id.* at 8-9, 22-24, 29-30. The FBI subsequently identified the other seven respondents as among those assisting in the PFLP's fundraising efforts. See *id.* at 30-39, 246-249. Based on the information provided by the FBI, INS District Counsel Elizabeth Hacker drafted the initial deportation charges against the eight respondents in December 1986. *Id.* at 251; J.A. 68-71.

2. All eight respondents were originally alleged to be deportable because of their advocacy of world communism. See 8 U.S.C. 1251(a)(6)(D), (G)(v), and (H) (1982). The six non-residents were also alleged to be deportable on the ground that they had failed to maintain student status, worked without authorization, or overstayed a visit. See Pet. App. 79a-81a. In April 1987, respondents filed suit in federal district court, seeking to have the pending deportation proceedings enjoined. Respondents claimed that the provisions basing deportability on advocacy of world communism violated the First Amendment. They also contended that they were the victims of selective enforcement based on their association with the PFLP. See *id.* at 169a-170a.

Later that month, the INS withdrew the advocacy-of-communism charges against all eight respondents, leaving only the visa violation charges pending against the six non-residents. Pet. App. 169a. The INS amended the charges against respondents Hamide and Shehadeh (the permanent resident aliens), alleging that they were deportable under

8 U.S.C. 1251(a)(6)(F)(iii) (1982) because of their meaningful membership in an organization that advocates destruction of property. See Pet. App. 81a, 169a; see also note 19, *infra*.

Respondents' second amended complaint was filed on June 15, 1988. J.A. 17-52. Respondents contended that "8 U.S.C. 1251(a)(6), on its face and as applied in the pending deportation proceedings * * *, violates the First and Fifth Amendments to the United States Constitution." J.A. 48. They also alleged that the "investigation, arrest, detention and initiation and maintenance of deportation proceedings against [respondents] is a selective and vindictive prosecution of [respondents] in violation of [respondents'] First and Fifth Amendment[]" rights. J.A. 49. Respondents sought declaratory and injunctive relief, including an injunction against the pending deportation proceedings. J.A. 50-51.²

² The second amended complaint stated that the district court "ha[d] jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. §1329, 1331 and 1361 and the Declaratory Judgment Act, 28 U.S.C. §2201 *et seq.*" J.A. 22. The citation to "28 U.S.C. §1329" was presumably intended as a reference to 8 U.S.C. 1329 (1988), which provided (at the time the suit was filed) that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [8 U.S.C. 1151-1365]." Section 1329 was amended in 1996 to provide that "[n]othing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers." 8 U.S.C. 1329 (Supp. II 1996). That amendment does not apply, however, to suits that were pending at the time of the amendment. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 381(b), 110 Stat. 3009-650; 8 U.S.C. 1329 note (Supp. II 1996).

The district court held that it lacked jurisdiction to hear the claims of respondents Hamide and Shehadeh because those respondents had failed to exhaust their administrative remedies. Pet. App. 194a-195a. The court concluded, however, that it could properly adjudicate the claims of the other respondents—*i.e.*, the six non-resident aliens and the Arab-American Anti-Discrimination Committee (AADC). *Id.* at 195a-220a.³ It observed that the non-resident aliens and the AADC were “not engaged in any ongoing proceedings that would allow them to challenge” the statutory provisions at issue, since the only charges then pending against the non-residents were for routine status violations. *Id.* at 217a. It held on that basis that “unlike Hamide and Shehadeh, the [non-residents] and the [AADC] do not have any administrative remedies to exhaust with respect to the” challenged statutory provisions, “and consequently do not have to forsake district court adjudication of their claims.” *Ibid.* On the merits, the district court held that 8 U.S.C. 1251(a)(6)(D), (F)(iii), (G)(v), and (H) (1982) were substantially overbroad and therefore violative of the First Amendment. *Id.* at 220a-245a.

The court of appeals vacated the judgment of the district court. Pet. App. 166a-187a (*AADC I*). The

³ The plaintiffs in the initial district court proceedings included the eight individual respondents and respondent AADC. Several other organizations, and two other individuals (Michel Bogopolsky and Darryl Meyers), were also named as plaintiffs in the second amended complaint. See J.A. 22-35. The district court held that Bogopolsky, Meyers, and the organizational plaintiffs other than AADC all lacked standing to sue. Pet. App. 214a n.9. Those plaintiffs did not appeal the district court’s ruling (see *id.* at 172a) and are no longer parties to this case.

court held that respondent AADC lacked standing to sue. *Id.* at 179a-182a. It held that the non-residents’ challenge to Section 1251(a)(6) was not ripe. The court noted, *inter alia*, that the non-resident respondents “are not now charged under the challenged provisions,” and that “if charged and found deportable for violation of the challenged provisions, the [respondents] will have the opportunity to present their constitutional challenges to a court.” Pet. App. 185a.⁴

3. On January 7, 1994, the district court preliminarily enjoined the INS from conducting further deportation proceedings against the six non-resident aliens charged with visa violations, based on those respondents’ contention that they were the victims of unconstitutional selective enforcement. Pet. App. 138a-150a. For purposes of determining whether prohibited selective enforcement had occurred, the court stated, “the appropriate control group for [respondents] is: ‘individuals whom the government knows to be in violation of non-ideological provisions and who associate with terrorist organizations whose views

⁴ Respondents Hamide and Shehadeh did not appeal the district court’s determination that it lacked jurisdiction to entertain their constitutional challenges to Sections 1251(a)(6)(D), (F)(iii), (G)(v), and (H). See Pet. App. 171a. During the pendency of the appeal in *AADC I*, the INS added a charge that Hamide and Shehadeh were deportable under 8 U.S.C. 1251(a)(6)(F)(ii) (1988) because of their membership in an organization that advocates the unlawful assaulting or killing of government officers. See Pet. App. 81a, 175a. Following amendment of the relevant statutory provisions in 1990, Hamide and Shehadeh were further charged with having engaged in terrorist activities, defined by the Act to include “[t]he soliciting of funds or other things of value for terrorist activity or for any terrorist organization.” 8 U.S.C. 1182(a)(3)(B)(iii)(IV). See Pet. App. 4a.

the government endorses or tolerates.” *Id.* at 141a. The court authorized respondents to conduct further discovery bearing on the question whether individuals within that control group had been placed in deportation proceedings (*id.* at 143a-147a), and it entered a preliminary injunction in respondents’ favor. *Id.* at 148a-150a.

The district court concluded, however, that it lacked jurisdiction to consider the selective enforcement claim advanced by respondents Hamide and Shehadeh, and it therefore granted summary judgment to the government on that claim. Pet. App. 129a-137a. The court explained that the deportation charges filed against Hamide and Shehadeh—unlike the charges filed against the non-resident respondents—were themselves based on PFLP-related activities. See *id.* at 131a-134a. Under those circumstances, the court held, “Hamide and Shehadeh’s selective prosecution claim is totally subsumed within the merits of their potential facial or as applied challenges” to the statutory provisions on which the deportation charges were based. *Id.* at 131a; see also *id.* at 134a (“A selective prosecution claim is not proper when the allegations of the prosecution involve the same activity which the defendant claims is the constitutionally protected ‘true reason’ for the government’s decision to prosecute.”).

4. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 77a-128a (*AADC II*). At the time of the court of appeals’ decision in *AADC II*, the Immigration and Nationality Act (INA) provided that “[t]he procedure prescribed by, and all the provisions of chapter 158 of title 28 [the Hobbs Administrative Orders Review Act], shall apply to, and shall be the sole and exclusive

procedure for, the judicial review of all final orders of deportation.” 8 U.S.C. 1105a(a) (1994). The INA further provided that “[a]n order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right.” 8 U.S.C. 1105a(c) (1994). The Hobbs Act establishes procedures for direct review of agency actions in the courts of appeals. It provides, *inter alia*, that the reviewing court may transfer a case to a district court for resolution of ancillary factual issues. 28 U.S.C. 2347(b)(3).

Notwithstanding the INA’s provisions for exclusive judicial review in the courts of appeals, the court of appeals concluded that all eight respondents’ selective enforcement challenges were subject to immediate judicial review in the district court, despite the absence of a final order of deportation. The court first addressed the claims of the six non-residents. Because neither the Immigration Judge (IJ) nor the Board of Immigration Appeals (BIA) was authorized to consider a claim of selective enforcement, the court “conclude[d] that selective enforcement claims are not subject to the statutory provision for exclusive review after issuance of a final deportation order.” Pet. App. 87a. The court also stated that adjudication of a selective enforcement claim would require a factual inquiry that could not be conducted by a court of appeals on review of a final deportation order. The court concluded, in that regard, that a court of appeals in reviewing a final order of deportation would not be authorized to transfer a case to a district court pursuant to 28 U.S.C. 2347(b)(3) for resolution of pertinent factual issues that had not been resolved by the IJ or the BIA. Pet. App. 90a-91a.

The court of appeals also held that the district court had erred in declining to exercise jurisdiction over the selective enforcement claims advanced by respondents Hamide and Shehadeh. Pet. App. 95a-97a. The court reasoned that "[t]he selective enforcement claim necessarily imposes a different focus and requires the court to consider patterns of INS prosecutions rather than a particular application of a statute." *Id.* at 97a. The court remanded those claims for further consideration by the district court. *Ibid.*

The court of appeals then concluded that the six non-residents had established a likelihood of success on their selective-enforcement challenges to the institution of deportation proceedings. The court first upheld as not clearly erroneous the district court's selection of a "control group" comprising "aliens who have either violated non-ideological provisions or are associated with terrorist organizations whose views the government tolerates." Pet. App. 106a. The court then stated that a citizen's association with a disfavored group—even a foreign organization that engages in unlawful acts—may be punished only if the government can "establish a 'knowing affiliation' and a 'specific intent to further those illegal aims.'" *Id.* at 108a (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)). The court rejected the contention that the deportation of aliens should be subject to less stringent constitutional scrutiny than is the government's criminal prosecution or other regulation of citizens (Pet. App. 107a-116a), concluding that "constitutionally protected activities that the Government cannot punish by means of a criminal statute are likewise beyond its reach in a deportation proceeding." *Id.* at 112a-113a. It held that respondents "ha[d] provided evidence of disparate impact and of imper-

missibly motivated enforcement of the immigration laws," and on that basis it affirmed the preliminary injunction entered by the district court. *Id.* at 116a.⁵

5. Following the court of appeals' ruling, the government introduced extensive evidence in the district court detailing respondents' activities on behalf of the PFLP, as well as the circumstances leading up to the filing of the deportation charges. That evidence demonstrated, *inter alia*, that the responsible INS official had drafted the initial charges based on the FBI's determination that respondents were engaged in PFLP fundraising activities. See pp. 3-4, *supra*. The district court held that "[t]he government ha[d] failed to show that any of the [respondents] had the specific intent to further the unlawful aims of the PFLP." Pet. App. 74a.⁶ On that basis the court denied the

⁵ The court of appeals also held that the INS could not consider classified information in ruling on applications for legalization—i.e., adjustment to temporary resident status—filed by respondents Barakat and Sharif pursuant to the Immigration Reform and Control Act, Pub. L. No. 99-603, § 201(a), 100 Stat. 3394 (codified at 8 U.S.C. 1255a and discussed in *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43 (1993)). Pet. App. 116a-127a. We are informed that, without consideration of the classified evidence, respondents Barakat and Sharif were subsequently granted legalization. Those respondents consequently are no longer subject to deportation based on the original status violations.

⁶ The district court found that the evidence regarding the investigative materials presented to District Counsel Hacker before she made her initial charging decision contained hearsay and possible translation errors. Pet. App. 57a. It also held that the evidence, even if taken as true, would not establish that respondents had acted with a specific intent to further the PFLP's unlawful activities, because none of the statements made at the fundraising events referred unambiguously to terrorist acts. *Id.* at 63a-64a. Because the PFLP engages in both

government's motion to dissolve the existing injunction against the deportation of the six non-resident respondents and issued a preliminary injunction against the deportation proceedings involving respondents Hamide and Shehadeh. *Id.* at 44a-76a.

6. The government appealed the district court's ruling. While that appeal was pending, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. IIRIRA preserves the exclusive review of deportation orders in the courts of appeals under the Hobbs Act—as specified in former 8 U.S.C. 1105a (1994) for aliens against whom administrative proceedings were commenced prior to the effective date of IIRIRA, and as specified in 8 U.S.C. 1252 (Supp. II 1996) for cases instituted thereafter. See pp. 20-21, 25-26, *infra*. Of particular relevance here, however, is 8 U.S.C. 1252(g) (Supp. II 1996) (added by IIRIRA § 306(a)), which applies to cases commenced both before and after IIRIRA's effective date. It states, *inter alia*, that

[e]xcept as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to

lawful and unlawful activities, the court reasoned, evidence of respondents' participation in PFLP fundraising efforts was insufficient to demonstrate such intent. *Id.* at 64a-65a. The court also suggested that the government should have "follow[ed] the trail of the money" in order to determine whether funds raised by respondents were actually used to support terrorist activities. *Id.* at 68a.

commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

The government moved in the district court for dismissal of respondents' suit and for vacatur of the existing injunction. The government argued that the new Section 1252(g) confirms that respondents' constitutional challenge must be brought in the court of appeals if and when a final order of deportation is entered, and therefore bars the district court from exercising jurisdiction over respondents' challenge to the Attorney General's decision to "commence proceedings" against them. See J.A. 53-62.

The district court denied the motion to dismiss. Pet. App. 22a-43a. The court agreed with the government that new Section 1252(g) went into effect immediately upon the enactment of IIRIRA on September 30, 1996. Pet. App. 32a. It held, however, that application of Section 1252(g) to respondents' selective enforcement claims would deprive respondents of an "adequate" judicial remedy, both because it believed that delay in the adjudication of those claims would subject respondents to "irreparable injury" and because the facts necessary to resolve those claims would not be developed in the administrative proceedings. Pet. App. 39a-40a. The court concluded that

[respondents'] First Amendment injuries are immediate and cannot be addressed through post-deprivation review. Congress can bar the door to these claims, and bring on a serious constitutional confrontation, only if it acts with clear purpose. No such purpose has been displayed here, and thus, this Court finds that Section [1252(g)] does

not reach the constitutional claims at issue in this case.

Pet. App. 42a-43a. The government's appeal from that order was consolidated with its pending appeal from the preliminary injunction. See *id.* at 6a.

7. The court of appeals affirmed both the jurisdictional and merits rulings of the district court. Pet. App. 1a-21a (AADC III).

a. The court held that IIRIRA did not bar the district court from exercising jurisdiction over respondents' claims. It agreed with the government that the new Section 1252(g) applied to the instant case. Pet. App. 7a-8a. The court stated, however, that IIRIRA "would present serious constitutional problems" if it were construed to divest the court of jurisdiction over respondents' suit. *Id.* at 12a. It explained that the availability of other avenues of review was uncertain (see *id.* at 12a-15a), and specifically held that transfer to a district court under 28 U.S.C. 2347(b)(3) for resolution of factual issues would not be available in a deportation case. Pet. App. 12a-14a. The court also stated that in any event "prompt judicial review of [respondents'] claims was required because violation of [respondents'] First Amendment interests would amount to irreparable injury." *Id.* at 15a.

The court of appeals construed 8 U.S.C. 1252(f) (Supp. II 1996) (as amended by IIRIRA § 306(a)) "as permitting federal review of constitutional claims such as those at issue here, because no other avenues of meaningful federal review remain available." Pet. App. 15a. Section 1252(f) is entitled "Limit on injunctive relief" and provides that no lower court has jurisdiction to enjoin the operation of the relevant statutory provisions, "other than with respect to the

application of such provisions to an individual alien against whom proceedings under such part have been initiated." Pet. App. 9a-10a. The court asserted that "[b]ecause this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over the [respondents'] claims." *Id.* at 10a.

b. The court affirmed the district court's decision not to vacate the preliminary injunction entered in favor of the six non-resident respondents. Pet. App. 17a. The court explained that, at the time that injunction was initially entered, the government had elected not to introduce available evidence regarding respondents' fundraising activities, and that the government's subsequent decision to supplement the record provided no basis for vacatur of the injunction. *Ibid.*

c. The court of appeals also affirmed the district court's entry of a preliminary injunction in favor of respondents Hamide and Shehadeh. The court stated that "the central issue is whether the government impermissibly targeted [respondents] due to their affiliation with the PFLP, and did not so target aliens affiliated with other foreign-dominated organizations advocating violence and destruction of property." Pet. App. 20a-21a. It determined that "[t]he record contains evidence of numerous other cases of permanent resident aliens who did not face deportation proceedings despite their support for international organizations advocating violence and destruction of property." *Id.* at 19a. The court construed its decision on the prior appeal as "ma[king] it clear that targeting individuals because of activities such as fundraising is impermissible unless the government can show that group members had the specific intent to pursue illegal group goals." *Id.* at 20a.

8. The court of appeals denied the government's petition for rehearing with suggestion of rehearing en banc, with three judges dissenting. Pet. App. 246a-252a. The dissenting judges concluded that IIRIRA unambiguously foreclosed all judicial review until the entry of a final order of deportation, and that the Act, so construed, created no genuine constitutional difficulty. *Id.* at 248a-250a.

9. This Court granted the government's petition for a writ of certiorari, limited to the following question: "Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation." 118 S. Ct. 2059 (1998).

SUMMARY OF ARGUMENT

1. Even before the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, judicial review of the INS's decision to file deportation charges was unavailable prior to the entry of a final order of deportation. That result was implicit in former 8 U.S.C. 1105a (1994), which provided that review in the courts of appeals was the "sole and exclusive procedure" for challenging a final deportation order, and which required exhaustion of administrative remedies as a prerequisite to obtaining judicial review. That result was also consistent with the background principle that the filing of administrative charges is not a "final agency action" subject to immediate judicial review.

2. IIRIRA strengthens and makes explicit the pre-existing limitations on judicial review under the INA. In particular, new 8 U.S.C. 1252(g) (Supp. II 1996)

makes clear that the judicial review provisions contained in the INA itself are the exclusive means of challenging the government's conduct of the deportation process. Although most of new Section 1252 is inapplicable to cases (like the instant one) involving deportation proceedings instituted before IIRIRA's effective date, the Act provides that Section 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." 8 U.S.C. 1252 note (Supp. II 1996).

Contrary to the court of appeals' determination, 8 U.S.C. 1252(f) (Supp. II 1996) does not authorize the district court to adjudicate respondents' suit. Section 1252(f) is entitled "Limit on injunctive relief" and is by its terms a *restriction* on the remedial authority of a reviewing court. The court of appeals' construction of Section 1252(f) is particularly implausible when that provision is read together with 8 U.S.C. 1252(b) (9) (Supp. II 1996), which states unambiguously that judicial review of any claim (specifically including constitutional claims) arising from the conduct of deportation proceedings is available only after the entry of a final order. There is no justification for construing Section 1252(f) to authorize what Section 1252(b)(9) expressly prohibits. The court of appeals' reliance on Section 1252(f) is especially farfetched in light of the fact that no pre-IIRIRA statutory provision authorized respondents' challenge to the filing of deportation charges.

3. Deferral of respondents' selective enforcement challenge until the entry of a final order of deportation would not violate the Constitution or raise substantial constitutional concerns. Congress has broad latitude to regulate the mode and timing of judicial

review, even where constitutional claims are involved. It is, in particular, a familiar feature of administrative law that a litigant may be required to obtain a final agency decision on all of his claims before presenting his constitutional challenge to a court. See *Weinberger v. Salfi*, 422 U.S. 749 (1975). The final decision requirement avoids enmeshing the courts in constitutional litigation that might ultimately have proved to be unnecessary. It also avoids piecemeal review by ensuring that all challenges to the deportation process can be consolidated in a single judicial proceeding. Judicial refashioning of the scheme of review devised by Congress would be especially unwarranted in the field of immigration, where this Court has long recognized the primacy of the political Branches.

No decision of this Court suggests that statutory exhaustion and finality requirements must give way whenever delay in the resolution of disputed legal issues might temporarily discourage the exercise of First Amendment rights. Where (as here) Congress has stated unambiguously that judicial review should await the completion of administrative proceedings, a plaintiff whose claims arise under the First Amendment has no constitutional entitlement to immediate access to a judicial forum. In any event, postponement of the adjudication of their selective enforcement claims could not plausibly be expected to deter respondents from participating in any constitutionally protected expressive or associational activities in which they would otherwise engage.

Contrary to the court of appeals' holding, deferral of judicial review until the entry of a final order of deportation will not prevent the development of an adequate factual record. Both before and after the

enactment of IIRIRA, judicial review of a final order of deportation has been governed by the provisions of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* See 8 U.S.C. 1105a(a) (1994); 8 U.S.C. 1252(a)(1) (Supp. II 1996). The Hobbs Act specifically provides that the reviewing court of appeals may transfer a case to a district court for the resolution of pertinent issues of material fact that were not resolved (and were not required to be resolved) by the agency itself. 28 U.S.C. 2347(b)(3). Nothing in the text of the Hobbs Act or the INA renders the transfer mechanism inapplicable to judicial review of final orders of deportation. Even if the relevant provisions were regarded as ambiguous on this point, use of the transfer mechanism in an appropriate case is far more consonant with the totality of the statutory scheme than is the court of appeals' decision to permit immediate judicial resolution of the selective enforcement claim outside the statutorily prescribed procedure for administrative and judicial review—a decision that is inconsistent both with the plain language of IIRIRA and with the background rule that the filing of administrative charges is not subject to immediate judicial review.

ARGUMENT

THE COURTS BELOW LACKED JURISDICTION TO CONSIDER RESPONDENTS' CONSTITUTIONAL CHALLENGE TO THE FILING OF DEPORTATION CHARGES PRIOR TO THE ENTRY OF A FINAL ORDER OF DEPORTATION

It has long been an integral feature of the Immigration and Nationality Act (INA) that judicial review of deportation proceedings is available only upon the entry of a final order of deportation, and only through

the review procedures established by the Act itself. Congress has recently amended the Act in an effort to eliminate any possible uncertainty regarding that fundamental principle. Notwithstanding the clarity of IIRIRA's jurisdictional bar, however, the court of appeals in *AADC III* permitted this long-pending and disruptive litigation to continue. The court's analysis is flatly at odds with the plain language of the pertinent statutory provisions, and it is inconsistent with the background rule that the filing of administrative charges is not subject to immediate judicial review. Contrary to the court's assertion, moreover, adherence to the directive of Congress creates no genuine constitutional difficulty.

A. Even Before The Enactment Of IIRIRA, Judicial Review Of The Filing Of Deportation Charges Was Unavailable Prior To The Entry Of A Final Order Of Deportation

Before the enactment of IIRIRA, judicial review of final orders of deportation was governed by 8 U.S.C. 1105a (1994). Former Section 1105a generally provided that review in the courts of appeals pursuant to the Hobbs Administrative Orders Review Act (28 U.S.C. 2341-2351) "shall be the sole and exclusive procedure for[] the judicial review of all final orders of deportation." 8 U.S.C. 1105a(a) (1994). The INA also stated that "[a]n order of deportation or exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right." 8 U.S.C. 1105a(c) (1994). "The fundamental purpose behind [§ 1105a(a)] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling depar-

ture by dilatory tactics in the courts." *Foti v. INS*, 375 U.S. 217, 224 (1963); accord *Stone v. INS*, 514 U.S. 386, 399 (1995).⁷

⁷ Former Section 1105a was added to the INA by the Immigration and Nationality Act Amendments of 1961, Pub. L. No. 87-301, § 5(a), 75 Stat. 651. Prior to 1961, an alien against whom a final order of deportation had been entered could obtain judicial review in district court either by a petition for writ of habeas corpus (see *Heikkila v. Barber*, 345 U.S. 229 (1953)), or by an action for declaratory and injunctive relief under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* (see *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955)). As the Department of Justice explained in testimony before a House subcommittee, "[t]here are several objections to the divergent methods of review. They lack uniformity. They are not mutually exclusive. They result in a delay in deporting an alien who should be deported. There is a need for expedition, orderly venue, and the avoiding of repetitious court proceedings." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 27 (1961). Congress enacted Section 1105a "to create a single, separate, statutory form of judicial review of administrative orders for the deportation and exclusion of aliens from the United States." *Id.* at 22. As this Court observed in *Foti*, "[t]he key feature of the congressional plan directed at this problem [*i.e.*, disruptive and dilatory litigation] was the elimination of the previous initial step in obtaining judicial review—a suit in a District Court—and the resulting restriction of review to Courts of Appeals, subject only to the certiorari jurisdiction of this Court." 375 U.S. at 225. Congress expressly required exhaustion of administrative remedies as a prerequisite to judicial review, "[i]n an effort to curtail, if not to eliminate repetitious and unjustified appeals to courts for interference with the enforcement of deportation orders." H.R. Rep. No. 1086, *supra*, at 28.

Congress did preserve a limited role for habeas corpus in the deportation context, providing that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings." See 8 U.S.C. 1105a(a) (10) (1994). Orders of exclusion were reviewable *only* in habeas corpus proceedings. See 8 U.S.C. 1105a(b) (1994).

Section 1105a defined the procedures to be employed in reviewing a final order of deportation, and it required exhaustion of administrative remedies before a challenge to a deportation order could be brought. Section 1105a did not, in so many words, bar a court from reviewing the INS's initial decision to file deportation charges. It was generally recognized, however, that an alien could not evade the requirements of Section 1105a by filing suit before the administrative proceedings had concluded. As the Third Circuit explained in *Massieu v. Reno*, 91 F.3d 416 (1996),

even where an alien is attempting to prevent an exclusion or deportation proceeding from taking place in the first instance and is thus not, strictly speaking, attacking a final order of deportation or exclusion, it is well settled that judicial review is precluded if the alien has failed to avail himself of all administrative remedies, one of which is the deportation or exclusion hearing itself.

Id. at 421 (internal quotation marks omitted).⁸ See also *INS v. Chadha*, 462 U.S. 919, 938 (1983) (holding that 8 U.S.C. 1105a(a) authorized the court of appeals to entertain a constitutional challenge to a legislative

⁸ The plaintiff in *Massieu* asserted a constitutional challenge to the statutory provision under which he was alleged to be deportable. The court of appeals held that the INA required dismissal of the suit, explaining that "[a]lthough the immigration judge is not authorized to consider the constitutionality of the statute, this court can hear that challenge upon completion of the administrative proceedings." 91 F.3d at 424. It ordered dismissal of the alien's entire complaint, which included a claim of selective enforcement in retaliation for an exercise of First Amendment rights. See *id.* at 418, 426; *Massieu v. Reno*, 915 F. Supp. 681, 688 (D.N.J. 1996).

veto provision then contained within the INA, even though the Attorney General could not resolve the issue, on the ground that Section 1105a "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the [deportation] hearing").

The rule recognized in *Massieu* was not unique to immigration proceedings, but was consistent with generally applicable principles of administrative law. For example, in *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 239-245 (1980), this Court held that an agency's issuance of an administrative complaint is not "final agency action" subject to immediate judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*⁹ The Court reached that conclusion despite its evident assumption that the propriety of the initial charging decision would not be subject to further administrative review. *Id.* at 243. The Court also rejected the plaintiff's contention that it would suffer irreparable harm if judicial review were deferred, explaining that "the expense and annoyance of litigation is part of the social burden of living under government." *Id.* at 244 (internal

⁹ In *Standard Oil*, the Federal Trade Commission issued a complaint averring that it had "reason to believe" that eight major oil companies, including Standard Oil of California (Socal), were violating the Federal Trade Commission Act. 449 U.S. at 234. Socal filed suit in federal district court, "alleging that the Commission had issued its complaint without having 'reason to believe' that Socal was violating the Act." *Id.* at 235. The "gist" of Socal's suit was that "political pressure for a public explanation of the gasoline shortages of 1973 forced the Commission to issue a complaint against the major oil companies despite insufficient investigation." *Ibid.*

quotation marks omitted).¹⁰ In light of its longstanding efforts to protect the deportation process from disruptive litigation (see note 7, *supra*), Congress cannot plausibly be thought to have intended that the filing of deportation charges would be *more* susceptible to immediate judicial scrutiny than the issuance of administrative complaints in other fields.¹¹

¹⁰ The Court further explained that

the effect of the judicial review sought by Socal is likely to be interference with the proper functioning of the agency and a burden for the courts. Judicial intervention into the agency process denies the agency an opportunity to correct its own mistakes and to apply its expertise. *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975). Intervention also leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary. *McGee v. United States*, 402 U.S. 479, 484 (1971); *McKart v. United States*, 395 U.S. 185, 195 (1969).

* * * * *

In sum, the Commission's issuance of a complaint averring reason to believe that Socal was violating the Act is not a definitive ruling or regulation. It had no legal force or practical effect upon Socal's daily business other than the disruptions that accompany any major litigation. And immediate judicial review would serve neither efficiency nor enforcement of the Act. Those pragmatic considerations counsel against the conclusion that the issuance of the complaint was "final agency action."

449 U.S. at 242-243. Those concerns are directly applicable to the deportation context.

¹¹ The unavailability (prior to IIRIRA) of judicial review of INS charging decisions did not rest solely on the negative implication of Section 1105a, but also reflected the fact that no statutory provision affirmatively authorizes the federal courts to review an agency's decision to file an administrative charge.

B. IIRIRA Precludes Judicial Review Of Respondents' Selective Enforcement Claims Prior To The Entry Of A Final Order Of Deportation

1. IIRIRA was enacted to strengthen and make explicit the pre-existing limitations on judicial review under the INA. *Inter alia*, IIRIRA created a new 8 U.S.C. 1252 (Supp. II 1996), which is entitled "Judicial review of orders of removal." In significant respects, the new Section 1252 is consistent with former 8 U.S.C. 1105a (1994). Thus, judicial review of final orders of deportation is exclusively vested directly in the courts of appeals pursuant to the Hobbs Act's procedures, rather than in the district courts. Compare 8 U.S.C. 1252(a)(1) (Supp. II 1996) with 8 U.S.C. 1105a(a) (1994).¹² And the Act continues to

Respondents' second amended complaint alleged that the district court had jurisdiction under 8 U.S.C. 1329 and 28 U.S.C. 1331, 1361, and 2201. See note 2, *supra*. None of those provisions, however, creates a cause of action or authorizes adjudication of a suit against the government absent an independent waiver of sovereign immunity. Cf. *FDIC v. Meyer*, 510 U.S. 471, 475, 483-486 (1994); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37-38 (1992). Review in the district court under the APA was unavailable even before IIRIRA was enacted, both because the INA (as amended in 1961) established "a single, separate, statutory form of judicial review," H.R. Rep. No. 1086, 87th Cong., 1st Sess. 22 (1961); (see note 7, *supra*), and because the filing of administrative charges is not "final agency action" in any event, see *Standard Oil, supra*.

¹² Indeed, even prior to IIRIRA, in Section 440(a) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1276, Congress repealed the provision in 8 U.S.C. 1105a(a)(10) (1994) for habeas corpus review for aliens held in custody pursuant to an order of deportation (see note 7, *supra*), and replaced it with a bar to judicial review (even in the court of appeals) of deportation

provide that review of a final order of deportation is permitted only if the alien has exhausted all available administrative remedies. Compare 8 U.S.C. 1252(d) (Supp. II 1996) with 8 U.S.C. 1105a(c) (1994).

Within the new Section 1252, two provisions in particular reflect Congress's determination to foreclose premature judicial interference with the deportation process and to consolidate all judicial chal-

orders entered against aliens based on their commission of specified criminal offenses. Congress did not reinstate the provision for habeas corpus review of deportation orders when it enacted IIRIRA, and thereby continued to foreclose that once-available avenue for judicial review in the district courts.

Moreover, in IIRIRA Congress deleted the separate provision for judicial review of final exclusion orders by habeas corpus, see 8 U.S.C. 1105a(b) (1994); note 7, *supra*, and instead combined the separate deportation and exclusion processes under prior law into a uniform "removal" process. See 8 U.S.C. 1229a (Supp. II 1996). IIRIRA provides for judicial review of all such orders directly in the courts of appeals pursuant to 8 U.S.C. 1252 (Supp. II 1996). And to underscore its determination to eliminate delay caused by district court habeas proceedings in exclusion cases as soon as possible, Congress provided that during the transition period when administrative proceedings in exclusion cases initiated prior to the effective date of the pertinent amendments made by IIRIRA (April 1, 1997, see IIRIRA § 309(a), 110 Stat. 3009-625) were still governed by the pre-IIRIRA version of the INA (see IIRIRA § 309(c)(1), 110 Stat. 3009-625), judicial review of any final order of exclusion entered more than 30 days after the enactment of IIRIRA was to be governed by subsection (a) of 8 U.S.C. 1105a (1994) (which provided for judicial review only in the courts of appeals), not subsection (b) (which provided for judicial review of exclusion orders in habeas corpus proceedings). See IIRIRA § 309(c)(4)(A), 110 Stat. 3009-626. Thus, in both AEDPA and IIRIRA, Congress made unmistakably clear its intent to bar actions in federal district court challenging both deportation and exclusion proceedings.

lenges in the courts of appeals following entry of a final removal order. New Section 1252(b)(9) is entitled "Consolidation of questions for judicial review" and states:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9) (Supp. II 1996). New Section 1252(g) is entitled "Exclusive jurisdiction" and states:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

8 U.S.C. 1252(g) (Supp. II 1996).

Sections 1252(b)(9) and 1252(g) serve complementary functions. Section 1252(b)(9) makes clear that the INA (as amended by IIRIRA) should not be construed to authorize judicial review of any aspect of the removal process except in the context of a challenge to a final order of removal. Section 1252(g) establishes that the judicial review provisions of the INA are exclusive—*i.e.*, a plaintiff may not invoke some more general statutory review provision as a basis for raising a claim "arising from the decision or action by the Attorney General to commence proceed-

ings, adjudicate cases, or execute removal orders against any alien." Taken together, those provisions manifest an unmistakable congressional intent that all challenges to the government's conduct of the deportation process—including suits that involve the "interpretation and application of constitutional * * * provisions," 8 U.S.C. 1252(b)(9) (Supp. II 1996)—may be brought only under the procedures provided by the INA itself, and only after the entry of a final order of deportation.¹³

2. Application of new Section 1252 to the instant case is complicated somewhat by IIRIRA's effective date provisions. Section 309(c)(1) of IIRIRA states the "general rule" that the amendments made by IIRIRA do not apply to "an alien who is in exclusion or deportation proceedings before the [Act's] effective date." 110 Stat. 3009-625 (as amended by the Act of October 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat.

¹³ In addition to new Sections 1252(b)(9) and 1252(g), IIRIRA precludes judicial review of decisions by the Attorney General regarding various forms of discretionary relief. 8 U.S.C. 1252(a)(2)(B) (Supp. II 1996). IIRIRA also precludes judicial review of orders of removal of certain classes of aliens whose orders of removal are based on the commission of specified criminal offenses. 8 U.S.C. 1252(a)(2)(C) (Supp. II 1996). Moreover, IIRIRA imposes various timing requirements designed to expedite the process of judicial review in those cases where review is still permitted. See, e.g., 8 U.S.C. 1252(b)(1) (Supp. II 1996) ("The petition for review must be filed not later than 30 days after the date of the final order of removal."); compare 8 U.S.C. 1105a(a)(1) (1994) (pre-IIRIRA version of INA allowed petition for review to be filed "not later than 90 days after the date of the issuance of the final deportation order"); 28 U.S.C. 2344 (Hobbs Act generally requires that petition for review be filed within 60 days after entry of agency's final order).

3657); 8 U.S.C. 1101 note (Supp. II 1996). Section 306(c)(1) of IIRIRA, however, states an exception to that general rule. Section 306(c)(1) provides that

the amendments made by subsections (a) and (b) [of Section 306] shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act [8 U.S.C. 1252(g)] (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

110 Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657); 8 U.S.C. 1252 note (Supp. II 1996).¹⁴ Thus, while the rest of new Section 1252 is

¹⁴ Determining whether and when Section 1252(g) became applicable to the instant case involves two subsidiary questions: (1) What is the "effective date" of Section 1252(g)? and (2) Does Section 1252(g) apply to aliens who were placed in deportation proceedings before the Act's effective date? In the district court proceedings immediately following the enactment of IIRIRA, the parties disagreed as to whether the effective date of Section 1252(g) was September 30, 1996, or April 1, 1997. See Pet. App. 29a-32a. The district court agreed with the government that the effective date of Section 1252(g) was September 30, 1996. The Seventh, Ninth, and Eleventh Circuits, by contrast, have concluded that Section 1252(g) became effective on April 1, 1997. See *Lalani v. Perryman*, 105 F.3d 334, 336 (1997); *Hose v. INS*, 141 F.3d 932, 934 (9th Cir. 1998); *Auguste v. Reno*, 140 F.3d 1373, 1376 (11th Cir. 1998). Because both of those dates have now passed (and had passed by the time the court of appeals rendered its decision), and because respondents were placed in deportation proceedings before either date, that question is of no continuing significance in the instant case. Rather, the current applicability of Section 1252(g) to respondents' suit depends solely on whether that

inapplicable to aliens who (like respondents) were placed in deportation proceedings before IIRIRA's effective date, Section 1252(g) is immediately applicable to such aliens (see Pet. App. 7a-8a; *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997), petition for cert. pending, No. 97-526; *Lalani v. Perryman*, 105 F.3d 334, 336 (7th Cir. 1997); but see *Auguste v. Reno*, 140 F.3d 1373, 1376 (11th Cir. 1998)), and precludes reliance on any judicial review provision outside the INA itself.¹⁵

Section applies, after it has become effective, to aliens placed in deportation proceedings before the Act's effective date.

¹⁵ New Section 1252(g) states that judicial review of deportation proceedings is unavailable "[e]xcept as provided in this section." 8 U.S.C. 1252(g) (Supp. II 1996) (emphasis added). With respect to cases in which deportation charges were filed after IIRIRA's effective date (April 1, 1997, see IIRIRA § 309(a), 110 Stat. 3009-625), the italicized language clearly refers to 8 U.S.C. 1252(a) and (b) (Supp. II 1996), the provisions of new Section 1252 that authorize judicial review after the entry of a final order of removal. As the court of appeals recognized (see Pet. App. 8a-9a), however, literal application of all of the relevant provisions to persons (like respondents) who were placed in deportation proceedings before IIRIRA's effective date would create an anomalous result.

IIRIRA § 306(c)(1) makes new Section 1252(g) immediately applicable to respondents' suit, even though the "general rule" established by IIRIRA § 309(c)(1) is that the Act does not apply to aliens who were in deportation proceedings before the Act's effective date. See pp. 28-30, *supra*. If Section 1252(g) were read literally to foreclose reliance on any judicial review provision outside of the new Section 1252—and if (by virtue of IIRIRA § 309(c)(1)) new Section 1252(a) and (b) do not apply to aliens who were placed in deportation proceedings before IIRIRA's effective date—then respondents would be deprived of *all* judicial review, even after the entry of a final order.

3. Although the *AADC III* court agreed with the government that new Section 1252(g) applies to respondents' suit, it nevertheless concluded that the suit could go forward. The court based its holding on new Section 1252(f) of Title 8 (as added by IIRIRA § 306(a)). That provision is entitled "Limit on injunctive relief" and states in pertinent part:

The court of appeals sought to avoid that result by holding (despite IIRIRA § 309(c)(1)) that other provisions of the new Section 1252, including new Section 1252(f), apply to the instant case. See Pet. App. 11a-12a. For the reasons stated below, see pp. 32-34, *infra*, Section 1252(f) would not provide a basis for jurisdiction over respondents' suit even if it applied to the instant case. We believe, however, that the textual anomaly is properly resolved by holding that respondents may obtain judicial review, if and when a final order of deportation is entered against them, pursuant to the provisions of former 8 U.S.C. 1105a (1994) rather than pursuant to the new Section 1252. That reading faithfully implements IIRIRA § 309(c)(1)(B), which specifically addresses the application of IIRIRA to aliens placed in deportation proceedings before the Act's effective date and provides, with limited exceptions not relevant here, that "the proceedings (including judicial review thereof) shall continue to be conducted without regard to [the] amendments" made by IIRIRA. 110 Stat. 3009-625; 8 U.S.C. 1101 note (Supp. II 1996). Cf. *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1793 (1996) ("When Congress includes a provision that specifically addresses the temporal effect of a statute, that provision trumps any general inferences that might be drawn from the substantive provisions of the statute."). The new Section 1252(g) applies to such aliens, however, and thereby expressly reinforces the rule that judicial review is available for such aliens only as provided in 8 U.S.C. 1105a itself. See pp. 27-29, *supra*.

Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter [8 U.S.C. 1221-1231], as amended by [IIRIRA], *other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.*

8 U.S.C. 1252(f) (Supp. II 1996) (emphasis added). Relying on the italicized language, the court of appeals stated that “[b]ecause this case involves individual aliens against whom deportation proceedings have been initiated, subsection (f) would appear to allow federal jurisdiction over [respondents’] claims.” Pet. App. 10a. Even assuming that Section 1252(f) applies to the instant case (but see pp. 28-30 and note 15, *supra*), the court’s interpretation of that provision is seriously flawed.

a. The plain text of Section 1252(f)(1) will not support the court of appeals’ reading. Section 1252(f) does not vest the district courts with jurisdiction over any defined category of cases. Rather, Section 1252(f) is entitled “Limit on injunctive relief” (see *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1226 (1998) (heading of a section is relevant in determining its meaning)), and is by its terms a *restriction* on the remedial authority of a reviewing court. See 8 U.S.C. 1252(f)(1) (Supp. II 1996) (“no court (other than the Supreme Court) shall have jurisdiction or authority * * * ”); Pet. App. 249a n.1 (O’Scannlain,

J., dissenting from denial of rehearing en banc). That Section makes clear, most obviously, that even if a court has a proper statutory basis for adjudicating a suit (*e.g.*, on review of a final order of deportation), it may not under any circumstances grant *classwide* injunctive relief against the operation of any provision contained in 8 U.S.C. 1221-1231 (Supp. II 1996). But nothing in Section 1252(f) empowers a federal court to adjudicate a suit except where some *other* statutory provision vests the court with jurisdiction and provides the plaintiff with a cause of action. There is no such statutory provision here that authorizes respondents’ suit.

b. The implausibility of the court of appeals’ construction of Section 1252(f)(1) is particularly clear when that provision is read in light of new Section 1252(b)(9). Section 1252(b)(9) states unambiguously that judicial review of any claim (specifically including constitutional claims) arising from the conduct of removal proceedings is available only after the entry of a final order. See p. 27, *supra*. Indeed, it is difficult to conceive of statutory language that would more clearly foreclose the district court from adjudicating respondents’ suit. If Section 1252 is to be read as a coherent whole, Section 1252(f)(1) cannot be interpreted to authorize what Section 1252(b)(9) flatly prohibits. Cf., *e.g.*, *United Savings Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme,” as where “only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”); *Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-632 (1973) (“It is well established that our task in interpreting

separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose.").

c. As we explain above, see pp. 20-24, *supra*, there was no statutory basis for respondents' suit even before IIRIRA was enacted. Sections 1252(b)(9) and 1252(g) are properly understood not as an attempt to divest the federal courts of jurisdiction they previously possessed, but as an effort to make *absolutely clear* what should have been apparent all along: that review of the INS's conduct of deportation proceedings is available only after the entry of a final order of deportation, and only under the INA provisions specifically provided for that purpose. Given IIRIRA's purpose to streamline the deportation process and safeguard it from disruptive litigation, it is especially farfetched to construe Section 1252(f)(1) as affirmatively authorizing a challenge that could not have been brought before IIRIRA was enacted.

C. Deferral Of Respondents' Selective Enforcement Challenge Until The Entry Of A Final Order Of Deportation Would Not Violate The Constitution

The government does not contend that respondents are permanently foreclosed from obtaining judicial resolution of their selective enforcement claims. Rather, our position is (and has been throughout this litigation) that such claims can be raised in the court of appeals if and when a final order of deportation is entered. There is nothing anomalous about such an approach. In other circumstances, this Court has held that the defendant in an administrative or judicial proceeding may properly be required to litigate the case to its conclusion, even where the gravamen of his claim is that the prosecution was unlawfully

brought in the first instance. See, e.g., *Standard Oil*, 449 U.S. at 239-245 (discussed at pp. 23-24, *supra*); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268-270 (1982) (holding that criminal defendants could not immediately appeal the district court's denial of their motion to dismiss an indictment, and explaining that the defendants' claim of prosecutorial vindictiveness could adequately be reviewed on appeal from a final judgment of conviction); *Younger v. Harris*, 401 U.S. 37 (1971) (federal courts should ordinarily abstain from adjudicating constitutional challenge to pending state prosecution); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) ("[*Younger*] and its progeny espouse a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.").

Despite the availability of judicial review after the entry of a final order of deportation, the court of appeals concluded that IIRIRA "would present serious constitutional problems" if it were construed to preclude immediate judicial resolution of respondents' suit. Pet. App. 12a. The court observed that "neither the immigration judge ('IJ') nor the Board of Immigration Appeals ('BIA') has the authority to consider a selective enforcement claim during a deportation proceeding." *Ibid.* It stated that "prompt judicial review of [respondents'] claims [i]s required because violation of [respondents'] First Amendment interests would amount to irreparable injury." *Id.* at 15a. The court also asserted that "the factual record necessary to the adjudication of [a selective enforcement] claim would not be available to a federal court reviewing a final deportation order" (*id.* at 12a), and it specifically rejected (see *id.* at 12a-13a) the government's

contention that the proceedings on petition for review of a final deportation order could be transferred to a district court pursuant to 28 U.S.C. 2347(b)(3) if additional evidentiary proceedings were required. Contrary to the court of appeals' conclusion, judicial review of a final order of deportation provides a fully adequate mechanism for addressing respondents' constitutional claims.¹⁶

1. This Court has stated that a "serious constitutional question" * * * would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). The Court has also made clear, however,

¹⁶ It is a familiar canon of construction that ambiguous statutes will be interpreted in a manner to avoid "a serious doubt of constitutionality." *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 465 (1989). Because Congress has clearly and unambiguously foreclosed judicial review of respondents' claims before the entry of a final order of deportation, however, there is no basis for applying that canon in the instant case. Compare, e.g., *United States v. Locke*, 471 U.S. 84, 96 (1985) ("We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.") (internal quotation marks omitted). Rather, respondents can prevail only if dismissal of their suit, as required by IIRIRA, would actually violate the Constitution. It plainly would not. For the reasons stated below, the application of IIRIRA to the instant case does not even raise "serious doubt of constitutionality." Compare *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1228 (1998) (doctrine that ambiguous statutes should be construed to avoid serious constitutional doubts "does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious"; rather, it applies only when "the alternative is a serious likelihood that the statute will be held unconstitutional").

that Congress has substantial flexibility to regulate the mode and timing of judicial review, even where constitutional claims are involved. The Court has recognized, in particular, that a litigant can be required to obtain a final administrative resolution of all of his claims before presenting his constitutional challenge to the court charged by statute with reviewing the agency's decision. The requirement of a final agency decision may serve important purposes even when (as is typically the case, for example, with respect to a constitutional attack on an Act of Congress) the agency itself is not authorized to consider the constitutional claim.

In *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court applied the foregoing principles to a situation closely analogous to the instant case. *Salfi* involved a constitutional challenge to eligibility provisions contained within the Social Security Act. See *id.* at 752-755. The Act authorized judicial review of a "final decision of the Secretary." 42 U.S.C. 405(g) (quoted in *Salfi*, 422 U.S. at 757 n.5). It further provided that decisions of the Secretary regarding the award or denial of benefits would be judicially reviewable only pursuant to the review provision contained within the Act itself. 42 U.S.C. 405(h) (quoted in *Salfi*, 422 U.S. at 757 n.4); see 422 U.S. at 756-759.

The Court held that the restriction imposed by Section 405(h) applied to constitutional claims. 422 U.S. at 761. It further held that Section 405(h), so construed, could not properly be analogized to a statutory provision that would eliminate review of constitutional claims altogether. The Court explained that

the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions. Thus the plain words of * * * § 405(h) do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act. The result is not only of unquestionable constitutionality, but it is also manifestly reasonable, since it assures the Secretary the opportunity prior to constitutional litigation to ascertain, for example, that the particular claims involved are neither invalid for other reasons nor allowable under other provisions of the Social Security Act.

422 U.S. at 762.

Postponing adjudication of respondents' selective enforcement claims until the entry of a final order of deportation serves similar purposes. Even though the LJ and BIA are not authorized to resolve claims of selective enforcement, it does not follow that respondents' participation in administrative proceedings would be "futile" (Pet. App. 92a, 94a (*AADC II*)), since respondents may be able to persuade administrative officials (or the reviewing court) that they have other grounds for avoiding deportation. Adherence to the mode of review devised by Congress ensures that judicial resolution of respondents' constitutional claims, with the attendant intrusion into the agency's internal deliberative processes they seek, will not occur unnecessarily. Deferral of respondents' selective enforcement claims until the entry of a final order of deportation also prevents "piecemeal review,"

Standard Oil, 449 U.S. at 242 (see note 10, *supra*), by ensuring that all challenges to the deportation process can be consolidated in a single judicial proceeding.¹⁷

2. Congress's authority to regulate the mode and timing of judicial review is especially broad in the immigration context, where this Court has long recognized the particular need for judicial deference to the political Branches. "Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Accord, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81-82 (1976) ("The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the

¹⁷ Postponement of judicial review until after the entry of a final order also ensures that consideration of the evidence bearing on the deportation charges will be undertaken by the agency in the first instance, and that the agency's factual findings will be reviewed by the court under an appropriately deferential standard. In the instant case, the district court's resolution of the selective enforcement claim was based in substantial measure on the court's own evaluation of what it regarded as the relevant evidence. See p. 11 & note 6, *supra*. That approach was erroneous. See *Cameron v. Johnson*, 390 U.S. 611, 621 (1968) (plaintiff could not establish bad-faith prosecution warranting injunctive relief simply by showing that the evidence would not support a conviction on the criminal charge); cf. *Waters v. Churchill*, 511 U.S. 661, 677-678 (1994) (plurality opinion); *id.* at 686-694 (Scalia, J., concurring in the judgment). The actual nature and extent of Hamide and Shehadeh's PFLP-related activities will of course be crucial to the ultimate disposition of the deportation charges against them. The courts have no authority, however, to resolve those issues in advance of the administrative proceedings under the rubric of adjudicating a selective enforcement claim.

President in the area of immigration and naturalization.”) (footnote omitted); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210 (1953) (this Court’s decisions “have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control”); *Reno v. Flores*, 507 U.S. 292, 305-306 (1993); *Fiallo v. Bell*, 430 U.S. 787, 794-795 (1977); *Kleindienst v. Mandel*, 408 U.S. 753, 765-767 (1972); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-590 (1952). “Over no conceivable subject is the legislative power of Congress more complete.” *Flores*, 507 U.S. at 305 (brackets omitted).

The need for judicial deference is not limited to statutory provisions defining the substantive terms on which aliens will be permitted to enter and remain in this country. It extends as well to congressional decisions regarding the procedures by which individual deportation decisions are made and reviewed. Indeed, the danger that repetitive or unduly protracted litigation might disrupt the enforcement of the immigration laws has long been a subject of congressional concern. See note 7, *supra*. In light of Congress’s sweeping authority over the field of immigration, IIRIRA’s unambiguous requirement that challenges to the deportation process must await the entry of a final order is entitled to particular respect.

3. The fact that respondents have invoked the First Amendment does not alter the foregoing analysis. No decision of this Court suggests that statutory exhaustion and finality requirements must give way whenever a plaintiff’s challenge to agency conduct includes a claim brought under the First Amendment. The court of appeals in *AADC II* relied (see

Pet. App. 93a) on *Dombrowski v. Pfister*, 380 U.S. 479 (1965), which held that a federal court could under certain circumstances enjoin state officials from instituting criminal prosecutions that impair the plaintiffs’ exercise of First Amendment rights. See *id.* at 483-498. This Court has since made clear, however, that *Dombrowski* is properly understood to support the entry of injunctive relief only against prosecutions brought “in bad faith as harassing [plaintiffs’] exercise of protected expression *with no intention of pressing the charges or with no expectation of obtaining convictions, knowing that [plaintiffs’] conduct did not violate the statute.*” *Cameron v. Johnson*, 390 U.S. 611, 619-620 (1968) (emphasis added). Although respondents have argued that the government’s decision to bring deportation charges against them was based in part on improper considerations, they could not plausibly contend that INS officials brought those charges purely for purposes of harassment—*i.e.*, that those officials acted “with no expectation of obtaining [respondents’] removal from the country], knowing that [respondents] did not violate the” immigration laws.

Dombrowski is also distinguishable from the instant case in a second, and even more fundamental, respect. *Dombrowski* dealt with the manner in which the “equitable power” of the federal courts should be exercised when Congress has not clearly defined the proper mode and timing of judicial intervention. See 380 U.S. at 484 & n.2. Indeed, the Court concluded that the plaintiffs had stated a claim under 42 U.S.C. 1983 (see 380 U.S. at 490); the question before it was whether the federal courts should withhold equitable relief despite the facial applicability of a federal cause of action. Nothing in *Dombrowski* remotely suggests

that a federal court may disregard express statutory limits on its own jurisdiction whenever delay in the resolution of disputed legal issues might temporarily discourage the exercise of First Amendment rights. Where (as here) Congress has stated unambiguously that judicial review should await the completion of administrative proceedings, *Dombrowski* does not cast doubt upon the constitutionality of that determination.¹⁸

In any event, postponement of the adjudication of respondents' selective enforcement claims until after the deportation charges are resolved on the merits at the administrative level could not reasonably be expected to have a significant deterrent effect upon their participation in any constitutionally protected expressive or associational activities in which they

¹⁸ Respondents have relied (Br. in Opp. 15 n.9) on *Younger v. Harris*, 401 U.S. 37 (1971), and *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Younger* the Court relied on "equitable principles" in holding that the federal courts should generally abstain from entertaining collateral constitutional challenges to ongoing state proceedings. 401 U.S. at 54. Although the Court indicated that certain forms of bad-faith prosecution might warrant an exception to the general rule (*id.* at 48), it did not suggest that a mechanism for immediate judicial resolution of First Amendment claims is required by the Constitution. Indeed, the Court made clear that mere delay or uncertainty as to the proper resolution of First Amendment issues, and the "chilling effect" that might ensue, did not provide an adequate justification for federal intervention in ongoing state proceedings. *Id.* at 50-52. In *Freedman*, the Court held that a prompt judicial ruling was a prerequisite to any prior restraint on communicative activities. 380 U.S. at 58-59. Respondents, however, do not claim to have been the subjects of any prior restraint. Moreover, neither *Younger* nor *Freedman* implicated Congress's sweeping powers over the field of immigration. See pp. 39-40, *supra*.

would otherwise engage. Compare *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972) ("Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm"). Respondents have offered no basis for believing that their continued association with the PFLP could be expected to affect either the adjudication of the substantive deportation charges, or the ultimate disposition of their claims that those charges were impermissibly brought based on their *past* activities on behalf of the PFLP. Moreover, the activities that allegedly would be "chilled" by the deportation proceedings—the provision of material support to the PFLP—are currently the subject of civil and criminal prohibitions under other federal laws.¹⁹ The pendency of deportation charges is

¹⁹ The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 302, 110 Stat. 1248, authorizes the Secretary of State to designate "foreign terrorist organization[s]." 8 U.S.C. 1189(a)(1) (Supp. II 1996). The Act prescribes criminal penalties for any person within the United States or under the jurisdiction thereof who "knowingly provides material support or resources" to any organization so designated (18 U.S.C. 2339B(a)(1) (Supp. II 1996)), and authorizes the Attorney General to seek injunctive relief to prevent violations. 18 U.S.C. 2339B(c) (Supp. II 1996). Pursuant to the Act, the Secretary of State has designated the PFLP as a foreign terrorist organization. 62 Fed. Reg. 52,650 (1997). Even before the passage of the AEDPA, financial transactions between United States residents and the PFLP (and several other Middle Eastern terrorist organizations) had been prohibited by Executive Orders issued pursuant to, *inter alia*, the International Emergency Economic Powers Act, 50 U.S.C. 1701 *et seq.* See 60 Fed. Reg. 5079 (1995); see also 61 Fed. Reg. 1695 (1996) (continuing prohibition in effect); 62 Fed. Reg. 3439 (1997) (same); 63 Fed. Reg. 3445 (1998) (same).

therefore highly unlikely to impose a meaningful increment of deterrence to the type of fundraising activities in which the INS believes respondents to have engaged.

4. The court of appeals erred in concluding that respondents' inability to raise their selective enforcement claims during the administrative process would prevent the compilation of an adequate record for judicial review. See Pet. App. 12a-14a, 90a-91a. Both before and after the enactment of IIRIRA, judicial review of a final order of deportation has been governed by the provisions of the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* See 8 U.S.C. 1105a(a) (1994); 8 U.S.C. 1252(a)(1) (Supp. II 1996). The Hobbs Act specifically provides that the reviewing court of appeals may transfer a case to a district court for the resolution of pertinent issues of material fact that were not resolved (and were not required to be resolved) by the agency itself in an administrative hearing. 28 U.S.C. 2347(b)(3). If dis-

As the petition for a writ of certiorari explains, we believe that respondents' fundraising activities are not entitled to First Amendment protection. See Pet. 20-25. The court of appeals in *AADC III* disagreed, holding that respondents could not constitutionally be "targeted" for raising funds for a foreign terrorist organization unless they acted with specific intent to further the group's unlawful aims. See Pet. App. 20a. The effect of the statute and Executive Orders described above, however, is that the district court's injunction against the pending deportation proceedings cannot insulate respondents from punishment if they continue to engage in PFLP fundraising activities. Cf. *Younger*, 401 U.S. at 50-51 (where state criminal statute was potentially subject to an acceptable limiting construction, injunction against pending prosecution would not appreciably lessen plaintiffs' fears that their conduct might eventually be subjected to criminal penalties).

position of a selective enforcement claim requires resolution of factual issues not addressed in the administrative record, transfer pursuant to Section 2347(b) (3) would facilitate resolution of those issues while respecting Congress's unambiguous determination that judicial review of deportation proceedings should await the entry of a final order.³⁰

³⁰ Since the enactment of IIRIRA, two courts of appeals have held that at least under some circumstances, an alien subject to a final order of deportation might obtain review of that order by petition for habeas corpus under 28 U.S.C. 2241. See *Goncalves v. Reno*, No. 97-1953, 1998 WL 236799, at *8-*13 (1st Cir. May 15, 1998); *Lerma de Garcia v. INS*, 141 F.3d 215, 217 (5th Cir. 1998). Two other courts of appeals have made similar statements, although in dicta, since neither case actually involved a petition for habeas corpus. See *Jean-Baptiste v. Reno*, No. 97-6062, 1998 WL 228120, at *9 (2d Cir. May 8, 1998); *Ramallo*, 114 F.3d at 1214. But see *Hose v. INS*, 141 F.3d 932, 935-936 (9th Cir. 1998) (new Section 1252(g) precludes habeas review). To permit an alien subject to a final order of deportation to obtain review of that order by way of habeas corpus is contrary to both the text and purpose of AEDPA and IIRIRA. As explained in note 12, *supra*, Congress, in enacting AEDPA, repealed the prior provision in 8 U.S.C. 1105a(a)(10) (1994) that created a limited habeas corpus exception to the exclusive judicial review procedure under the Hobbs Act. Moreover, the new Section 1252(g) unambiguously precludes judicial review of any aspect of the deportation process except through the review provisions of the INA itself, an integral feature of which is the routing of challenges directly to the courts of appeals so as to avoid unduly protracted litigation. The new Section 1252(b)(9) underscores that purpose. Accordingly, the government has filed suggestions of rehearing en banc in *Goncalves*, *Lerma de Garcia*, and *Jean-Baptiste*. The approach taken by the court of appeals in the instant case is disruptive of the statutory scheme in an additional way, since it permits the district court to interrupt the administrative proceedings *before* the entry of a final order of deportation.

Nothing in the text of the Hobbs Act or the INA renders the transfer mechanism in 28 U.S.C. 2347(b)(3) inapplicable to judicial review of final orders of deportation. Indeed, IIRIRA specifically prohibits the reviewing court from invoking another provision of the Hobbs Act that allows for an alternative means of resolving certain factual issues, namely by remanding the case to the agency under 28 U.S.C. 2347(c).²¹

²¹ Section 2347(c) provides for the court of appeals before which a proceeding is pending to order that additional evidence be taken by the agency if a party shows that the additional evidence is material and that there are reasonable grounds for the failure to adduce the evidence before the agency. The agency may then modify its findings and order and must then file the modified findings and evidence with the court. That provision for an interlocutory "remand" to the agency while the review proceeding remains pending in court is similar to the procedure provided for in sentence six of 42 U.S.C. 405(g), applicable in Social Security cases. See, e.g., *Shalala v. Schaeffer*, 509 U.S. 292, 297 (1993).

Congress's express bar to that sort of remand furthers IIRIRA's overall goal of expediting judicial review by preventing an alien from delaying the resolution of judicial proceedings by proffering new evidence to the court in the first instance. The alien must instead proffer the evidence to the BIA in a motion to reopen, which does not postpone judicial review of the final order of deportation itself. See *Stone v. INS*, *supra*. By contrast, the court of appeals' interpretation of 8 U.S.C. 1105a (1994) and 8 U.S.C. 1252 (Supp. II 1996) as containing an implicit bar to transferring a case to the district court pursuant to 28 U.S.C. 2347(b)(3)—and for that reason allowing an independent collateral attack in district court on the mere filing of administrative charges—fundamentally undermines IIRIRA's goal of expediting administrative and judicial review and channeling all challenges (constitutional or otherwise) to the deportation process to a single proceeding instituted in the court of appeals following the entry of a final order of deportation.

See 8 U.S.C. 1252(a)(1) (Supp. II 1996). That specific prohibition under the INA confirms that Congress did not intend to bar a transfer to the district court under 28 U.S.C. 2347(b)(3).²²

Even if the statutory scheme were regarded as ambiguous on this point, construing the INA's judicial

²² In concluding that transfer pursuant to 28 U.S.C. 2347(b)(3) is unavailable in deportation cases, the court of appeals relied (see Pet. App. 13a) on 8 U.S.C. 1252(b)(4)(A) (Supp. II 1996), which provides that the court in reviewing a final order of deportation "shall decide the petition only on the administrative record on which the order of removal is based." Section 1252(b)(4)(A) essentially duplicates the provision previously contained in former 8 U.S.C. 1105a(a)(4) (1994). The provision for judicial review of issues that were (or could have been) adjudicated by the IJ and the BIA on the basis of the administrative record compiled at the hearing before the IJ and BIA is in no way inconsistent with transfer to the district court pursuant to 28 U.S.C. 2347(b)(3) for resolution of any material factual issues bearing on the validity of the deportation order that were not (and could not have been) resolved in the deportation proceeding. Respondents' First Amendment selective enforcement claim would fall into the latter category to the extent respondents are able to identify genuine and substantial disputed issues of material fact in their petition for review of any final order of deportation. See note 23, *infra*.

The INA provisions requiring that judicial review be based on the administrative record—former 8 U.S.C. 1105a(a)(4) (1994) and new 8 U.S.C. 1252(b)(4)(A) (Supp. II 1996)—do not prescribe a special rule for immigration cases. It is the general rule under the Hobbs Act (as in administrative law cases generally, see 5 U.S.C. 706) that judicial review is on the basis of the administrative record. See 28 U.S.C. 2347(a); *Osaghae v. INS*, 942 F.2d 1160, 1161-1162 (7th Cir. 1991) (Posner, J.); *Makonnen v. INS*, 44 F.3d 1378, 1384-1385 (8th Cir. 1995). There is accordingly no basis for construing Sections 1105a(a)(4) and 1252(b)(4)(A) as carving out an implied exception, unique to immigration cases, to 28 U.S.C. 2347(b)(3).

review provisions to permit transfer in circumstances such as these is far more consonant with congressional intent than is the alternative proposed by respondents and adopted by the courts below. With respect to judicial oversight of the deportation process, Congress's manifest and overriding objective was to foreclose *all* judicial review until the entry of a final order of deportation. That was an integral feature of the pre-IIRIRA regime (see pp. 20-24, *supra*), and it has been made explicit in new Sections 1252(g) and 1252(b)(9) (see p. 26-27, *supra*). Any ambiguity as to the precise manner in which the review proceedings will be conducted once jurisdiction attaches should not be used to subvert that fundamental goal.

In the government's view, transfer to a district court under 28 U.S.C. 2347(b)(3) is appropriate only in the rare case where the facts necessary to resolve a substantial challenge to a final order of deportation were not and could not have been adequately developed in the course of the administrative proceedings.²³

²³ A court of appeals reviewing a final order of deportation should not routinely transfer a case to a district court whenever the petition for review includes a claim of selective enforcement. Rather, the alien should be required, at the time the petition for review is filed, to proffer specific evidence indicating that the decision to initiate deportation proceedings had been made for a constitutionally forbidden reason. Cf. *United States v. Armstrong*, 517 U.S. 456, 464-465 (1996). The government in responding to the petition for review should be afforded an opportunity to submit its explanation for the charging decision, including (if necessary) its own evidentiary materials. Transfer to the district court will be appropriate only in the very rare case where the court of appeals concludes that the alien's submission, if credited, refutes the government's explanation for the charging decision, and that disposition of the constitutional claim therefore requires resolution of

Transfer in that narrow class of cases is fully consistent with the normal course of Hobbs Act proceedings and violates no command in the INA itself. To permit respondents' suit to go forward, by contrast, is flatly at odds with the plain language of IIRIRA. It is also inconsistent both with the background rule that the filing of administrative charges is not subject to immediate judicial review (see pp. 23-24, *supra*), and with the recognition that "every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." *Stone v. INS*, 514 U.S. at 400 (citation omitted). Thus, whether or not the pertinent INA provisions would otherwise be construed to permit a Section 2347(b)(3) transfer, use of the transfer mechanism is far more consonant with the totality of the statutory scheme than is the court of appeals' decision to permit a collateral challenge that Congress has expressly foreclosed, and that has no analogue in ordinary administrative practice.

disputed questions of material fact. In determining whether that standard has been met, the court of appeals should bear in mind both that a selective-enforcement claim implicates "a 'special province' of the Executive," *Armstrong*, 517 U.S. at 464, and that the constitutional constraints applicable to other government action cannot be mechanically applied to immigration decisions, see *Flores*, 507 U.S. at 305-306; pp. 39-40, *supra*.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case should be remanded with instructions that the complaint be dismissed for lack of jurisdiction.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

DOUGLAS N. LETTER
Attorney

JULY 1998

APPENDIX

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Former Section 1105a of Title 8, United States Code (1988), provided:

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of Title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 6 months after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 60 days after the issuance of such order;

(1a)

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise;

(6) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion,

and in the opinion of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(7) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section

1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(8) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(9) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or

if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the nature and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

Section 1252 of Title 8, United States Code (Supp. II 1996), provides.:

§1252. Judicial review of orders or removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225(b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225(b)(1)

Notwithstanding any other provision of law, no court shall have jurisdiction to review-

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225(b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225(b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225(b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law, no court shall have jurisdiction to review-

(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General, other than the granting of relief under section 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a(c)(1)(B) of this title.

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed.

The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service**(A) In general**

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)-

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

(5) Treatment of nationality claims**(A) Court determination if no issue of fact**

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial

district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings**(A) In general**

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253(a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that-

- (i) no genuine issue of material fact about the defendant's nationality is pre-

sented, the court shall decide the motion only on the administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253(a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253(a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection-

(A) does not prevent the Attorney General, after a final order of removal has been issued,

from detaining the alien under section 1231(a) of this title;

(B) does not relieve the alien from complying with section 1231(a)(4) of this title and section 1253(g) of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all question of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

(c) Requirements for petition

A petition for review or for habeas corpus of an order of removal-

(1) shall attach a copy of such order, and

(2) shall state whether a court, has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if-

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the

petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225(b)(1)

(1) Limitation on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may-

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225(b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under Section 1225(b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of-

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the peti-

tioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225(b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225(b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determining of-

(i) whether such section, or any regulation issued to implement such section, is constitutional; or

(ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner-

(A) is an alien who was not ordered removed under section 1225(b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1129a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225(b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the alien is actually inadmissible or entitle to any relief from removal.

(f) Limit on injunctive relief**(1) In general**

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law, no court shall

have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Section 306(c)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-612, as amended by the Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(1), 110 Stat. 3657, provides:

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) [of Section 306 of IIRIRA] shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act [8 U.S.C. 1252(g)] (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

Section 309(c)(1) and (4) of IIRIRA, 110 Stat. 3009-625 to 3009-627, as amended by the Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2) and (3), 110 Stat. 3657, provides:

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.—

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings before the title III-A effective date—

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

* * * * *

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.—In the case in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241 (a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

Section 2347 of Title 28, United States Code, provides:

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by the

petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counterevidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or

22a

set aside its order, and shall file in the court the additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

(9)

No. 97-1252

FILED

SEP 11 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JANET RENO, ATTORNEY GENERAL, *et al.*,

Petitioners,

—v.—

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

Marc Van Der Hout
National Lawyers Guild
Van Der Hout & Brigagliano
180 Sutter Street, 5th Floor
San Francisco, California 94104
(415) 981-3000

Paul L. Hoffman
ACLU Foundation of
Southern California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Mark T. Hansen
John Walker
Sonnenschein Nath & Rosenthal
601 S. Figueroa Street, Suite 1500
Los Angeles, California 90017
(213) 892-5020

David D. Cole
(*Counsel of Record*)
Center for Constitutional Rights
Georgetown University Law Center
600 New Jersey Avenue N.W.
Washington, D.C. 20001
(202) 662-9078

Steven R. Shapiro
Lucas Guttentag
Lee Gelernt
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

60 Pp

QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

RULE 29.6 STATEMENT

This brief is filed on behalf of eight individuals—Aiad Barakat, Naim Sharif, Khader Musa Hamide, Julie Nuangugi Mungai, Ayman Mustafa Obeid, Amjad Obeid, Michel Ibrahim Shehadeh, and Basher Amer—and the American-Arab Anti-Discrimination Committee (ADC). The ADC does not have any parent or subsidiary companies.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	vi
STATEMENT.....	1
A. Introduction.....	1
B. Statement Of Facts.....	2
1. Defendants Targeted Plaintiffs For Their Lawful Political Associations And Activities	3
2. Defendants Did Not Seek To Deport Similarly Situated Aliens.....	6
3. Plaintiffs Are Suffering Irreparable Injury	7
C. Litigation Before IIRIRA.....	7
D. The Illegal Immigration Reform And Immigrant Responsibility Act Of 1996.....	10
E. Litigation After IIRIRA	11
SUMMARY OF ARGUMENT	14
ARGUMENT.....	18

	PAGE
I. THE APPLICABLE STATUTES SHOULD BE INTERPRETED TO PRESERVE MEANINGFUL JUDICIAL REVIEW OF PLAINTIFFS' CONSTITUTIONAL CLAIMS	18
A. Meaningful Judicial Review Requires District Court Jurisdiction Because Plaintiffs' Claims Require Factual Development Beyond The Administrative Record.....	20
1. Under The Uniform Judicial Interpretation of 8 U.S.C. § 1105a, District Courts Have Jurisdiction To Review Claims That Require Factfinding Beyond The Administrative Record.....	21
2. Under Both 8 U.S.C. § 1105a and IIRIRA, Courts Of Appeals May Not Transfer Claims Requiring Factfinding Beyond The Administrative Record To District Courts For Factfinding ...	24
B. Meaningful Judicial Review Requires Timely Access to District Court Because Plaintiffs Are Suffering Irreparable Injuries To Their First Amendment Rights	30

	PAGE
II. SECTION 1252(g) DOES NOT APPLY TO PLAINTIFFS' SELECTIVE ENFORCEMENT CLAIMS	37
A. Section 1252(g) Should Be Interpreted To Apply Only To Those Pending Deportation Cases As To Which The Attorney General Invokes The New Judicial Review Procedures Set Forth In The Rest Of Section 1252	39
B. In The Alternative, If Section 1252(g) Applies To Pending Cases, It Should Be Interpreted Not To Preclude Review Of Constitutional Claims	42
C. Plaintiffs' Interpretations Of Section 1252(g) As It Affects Pending Cases Are Consistent With Congress's Intent For Future Cases.....	43
D. Plaintiffs' Reading of Section 1252(g) Will Create No Additional Immigration Litigation Or Delays, But Simply Maintains The Status Quo With Respect To Pending Deportation Proceedings...	46
CONCLUSION.....	47

TABLE OF AUTHORITIES

Cases:	PAGE
<i>Abedi-Tajrishi v. INS</i> , 752 F.2d 441 (9th Cir. 1985) ...	22
<i>Bates v. State Bar of Arizona</i> , 433 U.S. 350 (1977) ...	31
<i>Bishop v. State Bar of Texas</i> , 736 F.2d 292 (5th Cir. 1984)	34
<i>Bowen v. City of New York</i> , 476 U.S. 467 (1986)	35
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986)	18
<i>Bragdon v. Abbott</i> , ___ U.S. ___, 118 S. Ct. 2196 (1998)	27
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601 (1973)	31
<i>Cameron v. Johnson</i> , 390 U.S. 611 (1968)	34
<i>Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.</i> , 960 F.2d 1339 (7th Cir.), <i>cert. denied</i> , 506 U.S. 861 (1992)	41
<i>Cheng Fan Kwok v. INS</i> , 392 U.S. 206 (1968)	<i>passim</i>
<i>Chisom v. Roemer</i> , 501 U.S. 380 (1991)	41
<i>Coriolan v. INS</i> , 559 F.2d 993 (5th Cir. 1977)	25, 27
<i>Dombrowski v. Pfister</i> , 380 U.S. 479 (1965)	33
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	30
<i>Fatehi v. INS</i> , 729 F.2d 1086 (6th Cir. 1984)	22
<i>Federal Trade Comm. v. Standard Oil of California</i> , 449 U.S. 232 (1980)	35

	PAGE
<i>Fitzgerald v. Peek</i> , 636 F.2d 943 (5th Cir. 1981)	34
<i>Fleurinor v. INS</i> , 585 F.2d 129 (5th Cir. 1978)	22
<i>Fort Wayne Books, Inc. v. Indiana</i> , 489 U.S. 46 (1989)	31
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	31
<i>Gerstein v. Pugh</i> , 420 U.S. 103 (1975)	33
<i>Ghaly v. INS</i> , 58 F.3d 1425 (9th Cir. 1995)	30
<i>Ghorbani v. INS</i> , 686 F.2d 784 (9th Cir. 1982)	24
<i>Gibson v. Berryhill</i> , 411 U.S. 564 (1973)	33
<i>Goncalves v. Reno</i> , 144 F.3d 110 (1st Cir. 1998)	37
<i>Gottesman v. INS</i> , 33 F.3d 383 (4th Cir. 1994)	22
<i>Harper & Row Publishers, Inc. v. Nation Enterprises</i> , 471 U.S. 539 (1985)	26
<i>Healy v. James</i> , 408 U.S. 169 (1972)	9
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	26, 41
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	23
<i>INS v. Doherty</i> , 502 U.S. 314 (1992)	14
<i>INS v. Stanisic</i> , 395 U.S. 62 (1968)	22, 37
<i>Jean v. Nelson</i> , 727 F.2d 957 (11th Cir. 1984), <i>aff'd on other grounds</i> , 472 U.S. 846 (1985)	22
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974)	19, 41, 42
<i>Lake Carriers' Ass'n v. United States</i> , 414 F.2d 567 (6th Cir. 1969)	28
<i>Lewellen v. Raff</i> , 843 F.2d 1103 (8th Cir. 1988), <i>cert. denied</i> , 489 U.S. 1033 (1989)	33, 34

	PAGE
<i>Lonchar v. Thomas</i> , 517 U.S. 314 (1996).....	26
<i>Magana-Pizano v. INS</i> , 1998 WL 55011 (9th Cir. Sept. 1, 1998)	37
<i>Mahammadi-Motlagh v. INS</i> , 727 F.2d 1450 (9th Cir. 1984)	22
<i>Makonnen v. INS</i> , 44 F.3d 1378 (8th Cir. 1995)	25, 27
<i>Massieu v. Reno</i> , 91 F.3d 416 (3d Cir. 1996)	23
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	35, 36
<i>Matter of S</i> , 9 I & N Dec. 252 (BIA 1961).....	1
<i>McNary v. Haitian Refugee Center</i> , 498 U.S. 479 (1991).....	<i>passim</i>
<i>Miami Herald Publishing Co. v. Tornillo</i> , 418 U.S. 241 (1974)	31
<i>Middlesex County Ethics Committee v. Garden State Bar Ass'n</i> , 457 U.S. 423 (1982)	33
<i>Mills v. Alabama</i> , 384 U.S. 214 (1966)	31
<i>Moore v. Sims</i> , 442 U.S. 415 (1979)	33, 34
<i>Nachman Corp. v. Pension Benefit Guaranty Corp.</i> , 446 U.S. 359 (1980)	26
<i>National Socialist Party of America v. Skokie</i> , 432 U.S. 43 (1977).....	31
<i>National Student Ass'n v. Hershey</i> , 412 F.2d 1103 (D.C.Cir. 1969)	32
<i>Oestereich v. Selective Service System Local Board No. 11</i> , 393 U.S. 233 (1968)	32

	PAGE
<i>Olaniyan v. District Director, INS</i> , 796 F.2d 373 (10th Cir. 1986).....	22, 39
<i>Osaghae v. INS</i> , 942 F.2d 1160 (7th Cir. 1991).....	25, 27
<i>Osmani v. INS</i> , 14 F.3d 13 (7th Cir. 1994)	30
<i>Rafeedie v. INS</i> , 880 F.2d 506 (D.C.Cir. 1989)	36
<i>Rodriguez-Barajas v. INS</i> , 992 F.2d 94 (7th Cir. 1993)	30
<i>Salameda v. INS</i> , 70 F.3d 447 (7th Cir. 1995)	30
<i>Salehi v. INS</i> , 796 F.2d 1286 (10th Cir. 1986)	39
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	31
<i>Tooloe v. INS</i> , 722 F.2d 1434 (9th Cir. 1983).....	22, 39
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	35
<i>Walters v. National Ass'n of Radiation Survivors</i> , 473 U.S. 305 (1985)	19
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975)	18
<i>Webster v. Doe</i> , 486 U.S. 592 (1988)	18, 19
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	35
<i>Wichert v. Walter</i> , 606 F.Supp. 1516 (D.N.J. 1985)....	34
<i>Wolff v. Selective Service Local Board No. 16</i> , 372 F.2d 817 (2d Cir. 1967).....	32
<i>Yi v. Maugans</i> , 24 F.3d 500 (3d Cir. 1994)	22, 23, 39
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	32, 33, 34

	PAGE
Legislative History:	
142 Cong. Rec. H12293 (Oct. 4, 1996)	40
S. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950)	28
H.R. Rep. No. 469 (Pt. 1), 104th Cong., 2d Sess. 161 (1996)	45
S. 1664, § 142(a) (passed by Senate, May 2, 1996) ...	26
Statutes and Regulations:	
8 U.S.C. § 1105a (1994).....	<i>passim</i>
8 U.S.C. § 1105a(a)(1)	10
8 U.S.C. § 1105a(a)(4)	2, 8, 22, 24, 25, 28
8 U.S.C. § 1105a(a)(5)	25
8 U.S.C. § 1227(a)(2)(A) (1994).....	4
8 U.S.C. § 1227(a)(2)(D)	4
8 U.S.C. § 1227(a)(4)(A)	4
8 U.S.C. § 1252 (Supp. II 1996)	<i>passim</i>
8 U.S.C. §§ 1252(a) - (f).....	12, 15, 38
8 U.S.C. § 1252(a)	10
8 U.S.C. § 1252(a)(1)	27
8 U.S.C. § 1252(b)	28, 44
8 U.S.C. § 1252(b)(4)	10, 27
8 U.S.C. § 1252(b)(5)	27
8 U.S.C. § 1252(b)(9).....	43, 44
8 U.S.C. § 1252(f)	10, 13, 43, 44, 45

	PAGE
8 U.S.C. § 1252(g)	<i>passim</i>
8 U.S.C. § 1329 (1988)	2, 8, 39
8 U.S.C. § 1329 (Supp. II 1996)	18, 22, 39
18 U.S.C. § 2	3
18 U.S.C. § 32.....	3
18 U.S.C. § 33.....	3
18 U.S.C. § 371	3
18 U.S.C. § 956	3
18 U.S.C. § 1116	3
18 U.S.C. § 1201	3
18 U.S.C. § 1203	3
18 U.S.C. § 1361	3
18 U.S.C. § 2332	3
28 U.S.C. § 1257	31
28 U.S.C. § 1331	<i>passim</i>
28 U.S.C. § 2241	37
28 U.S.C. § 2347(a)	28
28 U.S.C. § 2347(b)(3)	<i>passim</i>
28 U.S.C. § 2347(c)	27
28 U.S.C. § 2241	37
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L.No. 104-208, Div. C, 110 Stat. 3009.....	<i>passim</i>

PAGE

§ 306(c), 8 U.S.C. § 1252 note (Supp. II 1996).....	11, 40, 41
§ 309(c)(1), 8 U.S.C. § 1101 note (Supp. II 1996).....	11, 39, 42
§ 309(c)(2), 8 U.S.C. § 1101 note	11, 17, 40
§ 309(c)(3), 8 U.S.C. § 1101 note	11, 17, 40, 41
§ 309(c)(4), 8 U.S.C. § 1101 note	11, 39, 40
§ 381, 8 U.S.C. § 1329 note (Supp. II 1996).....	40

Other Authorities:

Levin, Ronald M., <i>Understanding Unreviewability in Administrative Law</i> , 74 Minn. L. Rev. 689 (1990).....	19
Monaghan, Henry, <i>First Amendment "Due Process,"</i> 83 Harv. L. Rev. 518 (1970)	32

STATEMENT

A. Introduction

This case began in 1987 when the Immigration and Naturalization Service (INS) arrested the individual plaintiffs, seven Palestinians and a Kenyan, and charged them with being deportable as members of an organization that advocates the "doctrines of world communism." No one had been deported under that charge for 26 years.¹ When plaintiffs filed suit challenging the constitutionality of these charges, the INS dismissed the original charges and substituted others. It then called a press conference to announce that the changes were tactical only, and that it still sought plaintiffs' deportation because of their political associations. Shortly thereafter, the FBI Director testified in Congress that if plaintiffs had been citizens there would have been no basis for their arrest, and that they had been arrested because of their association with a Communist organization.

Faced with evidence that the government had targeted them in retaliation for their associations, plaintiffs understandably were afraid to continue to engage in further political activity in support of Palestinian causes. Believing nonetheless that their political activity was protected by the First Amendment, plaintiffs sought relief in the only forum available to them—federal district court.

The government agreed at the outset that selective enforcement claims could be heard only in an original district court action.² The reason for this is straightforward: While 8 U.S.C.

¹ See *Matter of S*, 9 I & N Dec. 252 (BIA 1961).

² Order Re: Selective Prosecution Claim and Third Claim for Relief (Sept. 6, 1989) at 1-2 ("both parties agree and we concur that jurisdiction to hear Plaintiffs' selective prosecution claim exists in this Court"); Defendants' Memorandum in Response to the Court's Order of May 4, 1989, Concerning Its Jurisdiction over Plaintiffs' Selective Prosecution Claim and the Effect of Declaratory Relief (filed May 25, 1989) (CR 89) at 3 ("to the extent that it is appropriate for any court to entertain a selective enforcement challenge to the issuance of an Order to Show Cause, jurisdiction is in the district court").

§ 1105a (1994) generally creates exclusive review in the court of appeals for final orders of deportation, claims that cannot be heard on appellate review must be filed in an original district court action. Plaintiffs' selective enforcement claims could not be heard on appellate review because they required factual development beyond the scope of the administrative record,³ and appellate review must be based "solely upon the administrative record." 8 U.S.C. § 1105a(a)(4). Applying well-established law, the lower courts therefore found district court jurisdiction proper under 28 U.S.C. § 1331 and 8 U.S.C. § 1329 (1988).

Despite its initial concession that jurisdiction was proper in the district court, the government now argues that the district court never had jurisdiction, and that the only court that ever had jurisdiction over plaintiffs' claims was a court of appeals exercising appellate review of a final deportation order under 8 U.S.C. § 1105a.

B. Statement Of Facts

The injunctions under review are based on factual findings reached after considering a record consisting of over 11,000 pages of evidence, much of it developed through court-ordered discovery. In particular, the district court found: (1) that defendants singled plaintiffs out for their constitutionally protected associations with the Popular Front for the Liberation of Palestine (PFLP), without any evidence that plaintiffs specifically intended to further any unlawful ends; (2) that defendants did not seek to deport other similarly situated individuals; and (3) that plaintiffs are suffering irrepara-

³ Pet. App. 12a, 87a; Pet. Br. 38. Immigration judges and the Board of Immigration Appeals (BIA) do not have authority to review District Directors' discretionary decisions, including the decision to institute a deportation proceeding. Pet. App. 87a. Plaintiffs attempted to present their selective enforcement claims in the deportation hearings, but the INS successfully argued to the immigration judge that she lacked jurisdiction to hear them. See C.A. Supp. Exc. of Record 38 (excerpt of transcript from deportation hearing).

ble injury to their First Amendment rights as a result of the government's retaliatory actions.

These findings, *unchallenged by defendants on appeal*, could only be developed in district court, and are therefore critical to assessing the jurisdictional issue presented here.

1. Defendants Targeted Plaintiffs For Their Lawful Political Associations And Activities

The district court found that defendants targeted plaintiffs for their political associations, and that "there is no evidence in the record that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14. This finding was supported by a wide range of evidence, including the following:

1. The initial charges were predicated on First Amendment-protected activity—association with a group that advocates the doctrines of world communism. Pet. App. 3a, 80a-82a.

2. Then-FBI Director William Webster testified in Congress two months after plaintiffs' arrests that an FBI investigation had found no evidence of criminal or terrorist activity, that plaintiffs "were arrested because they are alleged to be members of a world-wide Communist organization which under the McCarran Act makes them eligible for deportation," and that "if these individuals had been United States citizens, there would not have been a basis for their arrest."⁴

⁴ Pet. App. 4a; J.A. 65-67. Had plaintiffs been supporting *illegal* conduct of the PFLP, they would have been subject to arrest (even as United States citizens) under the conspiracy or aiding and abetting statutes, 18 U.S.C. §§ 2, 371, and numerous statutes reaching terrorist acts abroad. See, e.g., 18 U.S.C. § 32 (destruction of aircraft in foreign air commerce); § 33 (destruction of motor vehicle in foreign commerce); § 956 (conspiracy to injure foreign property); § 1116 (attacking internationally protected persons); § 1201 (kidnapping of person in foreign commerce); § 1203 (taking of hostages); § 1361 (damage to American property); § 2332 (killing Americans abroad). Support of illegal activi-

3. The INS District Director who authorized the deportation proceedings admitted that plaintiffs "were singled out for deportation because of their alleged political affiliations with the [PFLP]." J.A. 93. He stated that the INS sought plaintiffs' deportation "at the behest of the FBI, which concluded after investigating plaintiffs that it had no basis for prosecuting plaintiffs criminally, and urged the INS to seek their deportation." J.A. 94.

4. When the INS changed its charges in response to plaintiffs' constitutional challenge, INS Regional Counsel William Odencrantz announced that the change was merely tactical, and that the INS continued to seek deportation of all eight plaintiffs because "[i]t is our belief that they are members of [the PFLP]." J.A. 72-73; Pet. App. 82a.⁵

5. Contemporaneous FBI memoranda prepared to urge the INS to deport plaintiffs confirm that plaintiffs were targeted

ties would also have warranted deportation under several provisions of the Immigration and Nationality Act (INA), none of which has ever been invoked here. *See, e.g.*, 8 U.S.C. §§ 1227(a)(2)(A) (crimes of moral turpitude); (a)(2)(D) (conspiring to commit sabotage or sedition); (a)(4)(A) (any criminal activity that endangers public safety or national security).

⁵ On the eve of the first preliminary injunction hearing in this case, the INS dropped its political association charges against the six nonimmigrant aliens—Aiad Barakat, Naim Sharif, Julie Mungai, Ayman Obeid, Amjad Obeid, and Basher Amer—and instead charged them with violating their visas, either by staying longer than permitted, working without authorization, or taking too few credits while on a student visa. It maintained political association charges against permanent residents Khader Hamide and Michel Shehadeh, first substituting a charge that they were associated with a group that advocates the destruction of property, and subsequently shifting to a charge that they provided material support to a terrorist organization. The INS has since granted Barakat and Sharif legalization, and accordingly concedes they are no longer subject to deportation "based on the original status violations." Pet. Br. 11 n.5. However, while the existing injunction bars the INS from filing new charges against Barakat and Sharif, the INS has not disavowed its intent to seek the deportation of all eight. All plaintiffs would be eligible to reside here permanently but for the government's charges that they are associated with the PFLP.

solely for lawful political associations and advocacy. The documents consist entirely of accounts of lawful political activity, and include detailed reports on political demonstrations, meetings, and dinners, as well as extensive quotations from political speeches and leaflets. Over 300 pages are devoted to tracking plaintiffs' distribution of PFLP newspapers that are available in public libraries throughout the United States. The memos repeatedly criticize plaintiffs' political views as "anti-US, anti-Israel, anti-Jordan," J.A. 150-51, 172-74, 181, 184, 190-91, and even "anti-REAGAN and anti-MABARAK [sic]." J.A. 165. The principal FBI report on plaintiffs states that its purpose is "to identify key PFLP people in Southern California so that law enforcement agencies capable of *disrupting the PFLP's activities* through legal action can do so." J.A. 152 (emphasis added). It specifically urges plaintiff Hamide's deportation, not because he engaged in any criminal acts, but because he is "intelligent, aggressive, dedicated, and shows great leadership ability." J.A. 142-43.

6. While the government and both of its amici misleadingly imply that plaintiffs' fundraising activities were the basis for the decision to deport, Pet. Br. 3, 11, 43-44, the district court found to the contrary that defendants were motivated by a wide range of speech and associational activities other than fundraising. The court found, based on government concessions, that the government targeted plaintiffs for their membership in the PFLP (Pet. App. 4a, 75a n.14, J.A. 93), distributing PFLP literature (Pet. App. 132a), recruiting new members (*id.*), communicating with PFLP leaders in the United States, and attending PFLP meetings, in addition to humanitarian fundraising. (Pet. App. 60a-61a).⁶

⁶ Although one would never know it from the government's brief, the district court also found, and defendants have conceded, that the PFLP—the second largest faction within the Palestine Liberation Organization—engages in a wide range of lawful activities both here and abroad, including the provision of "education, day care, health care, and social security, as well as cultural activities, publications, and political

2. Defendants Did Not Seek To Deport Similarly Situated Aliens

The district court also found that the INS has not sought to deport similarly situated aliens, including aliens with the same technical visa violations as plaintiffs, and aliens who were members and supporters of organizations that engaged in similar INA-proscribed activities and advocacy, such as the Nicaraguan Contras, Afghanistan Mujahedin, Mozambique RENAMO, several anti-Castro Cuban groups, and the Vietnamese Montagnards. Pet. App. 18a-19a, 106a-07a, 138a-50a, 50a-51a n.3, 74a; C.A. SER 97-265, 286-90, 309-31. In fact, the INS has not sought to deport *any* aliens other than plaintiffs for mere association since this case began more than 11 years ago. J.A. 207.⁷

organizing." Pet. App. 48a. Among other things, it operates day care centers, hospitals, and schools; provides health insurance to its members and their families; publishes political magazines and newspapers; and maintains diplomatic offices in many countries. J.A. 77-84.

⁷ In light of the government's failure to challenge any of the district court's findings as clearly erroneous, the Court should not be misled by its Statement, which makes assertions that have no support in or are directly contradicted by lower court findings. For example, the government begins its brief with a litany of charges regarding the PFLP's past terrorist acts. Pet. Br. 2-3 n.1. But the district court found (and the government does not dispute) that plaintiffs were not "in any way implicated" in any unlawful PFLP activities. Pet. App. 48a.

Similarly, the government asserts that the FBI and INS "established that Hamide was organizing fundraising events on behalf of the PFLP at which money was solicited for the stated purpose of supporting the organization's 'fighters.'" Pet. Br. 4. But the district court found that the evidence concerning this event—a widely advertised family style dinner open to the public and attended by more than 1,000 persons—did not support even a reasonable inference that fundraising was for terrorist activities, and defendants did not challenge that finding. Pet. App. 61a-63a, 75a n. 14. In fact, the government's own evidence showed that the funds raised were donated to the United States Organization for Medical and Educational Needs (U.S. OMEN), an IRS-certified tax-exempt humanitarian aid organization. Pet. App. 63a

3. Plaintiffs Are Suffering Irreparable Injury

In addition, the district court found that plaintiffs are suffering irreparable injury as a result of being targeted for deportation in retaliation for exercising their First Amendment rights. Pet. App. 149a, 74a; *see also* Pet. App. 93a-94a. Prior to their arrests, plaintiffs were active participants in the public debate concerning the Middle East and outspoken advocates of Palestinian self-determination. As a direct result of the proceedings, however, plaintiffs, and many others in the Palestinian community, became afraid to engage in even the most basic political activities, including reading magazines, discussing political issues publicly, and supporting the peace process in the West Bank.⁸

C. Litigation Before IIRIRA

In January 1994, the district court first granted a preliminary injunction to six of the eight plaintiffs. Pet. App. 138a.⁹ It declined to extend the injunction to plaintiffs Hamide and Shehadeh at that time only because it erroneously concluded that it lacked jurisdiction over their claims. Pet. App. 129a.

The government appealed from the first injunction, and plaintiffs Hamide and Shehadeh cross-appealed from the court's refusal to extend the injunction to them. Despite its earlier concession that the district court had jurisdiction over plaintiffs' claims, the government now argued that the district court lacked jurisdiction, and that plaintiffs could raise their

⁸ *See, e.g.*, J.A. 85-86; Dec. of Khader Hamide, Oct. 21, 1993 (deterred from supporting the peace process) (CR 245); Dec. of Amjad Obeid, Apr. 24, 1987 (deterred from reading magazines, speaking publicly, and even participating in Palestinian dance troupe) (CR 15).

⁹ In proceedings not at issue here, the district court in 1989 declared the "world communism" provisions unconstitutional. Pet. App. 188a. The government appealed, but while the appeal was pending, Congress repealed the provisions, and the court of appeals then reversed for lack of a justiciable controversy. Pet. App. 166a, 187a.

First Amendment claims only in connection with a petition for review of a final deportation order.

In November 1995, the court of appeals unanimously affirmed the initial preliminary injunction. It ruled that the district court had jurisdiction over plaintiffs' selective enforcement claims because those claims were not cognizable under the otherwise exclusive judicial review procedure set forth in 8 U.S.C. § 1105a. The court concluded that because appellate review under § 1105a is limited to the administrative record, 8 U.S.C. § 1105a(a)(4), and plaintiffs' selective enforcement claims required factual development beyond the administrative record, plaintiffs' claims could not be addressed on appellate review of a final deportation order. For the same reason, the court rejected the government's argument that a court of appeals could transfer the claims to a district court for factfinding under the Hobbs Act, 28 U.S.C. § 2347(b)(3)—facts developed in district court could not be considered on appellate review limited to the administrative record. Pet. App. 91a. Following this Court's directive that where a claim is not cognizable under 8 U.S.C. § 1105a, the alien's remedies "lie first in an action brought in an appropriate district court," *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 (1968), the court held that the district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 8 U.S.C. § 1329. Pet. App. 87a. For the same reasons, the court found that the district court had jurisdiction over Hamide and Shehadeh's claims. Pet. App. 95a-97a.

The court also found that plaintiffs' claims were ripe prior to a final deportation order. Plaintiffs were suffering irreparable injury to their First Amendment rights every day, their claims would not be addressed by the administrative proceedings or appellate review thereof, and delaying review would deny plaintiffs any redress for ongoing constitutional injuries. Pet. App. 85a-95a. As the court stated, "the chill to [plaintiffs'] First Amendment rights is an irreparable injury

that cannot be vindicated by post-deprivation review." Pet. App. 92a.

On the merits, the court of appeals held that plaintiffs are entitled to First Amendment protection as persons living in the United States, and that the government could not target them based on PFLP associational activity unless it showed that their association was "'knowing'" and with "'specific intent to further [the PFLP's] illegal aims.'" Pet. App. 108a (quoting *Healy v. James*, 408 U.S. 169, 186 (1972)).

The government sought no further review of this decision. On remand, however, it submitted over 10,000 additional pages of evidence, and moved to vacate the existing preliminary injunction. Plaintiffs Hamide and Shehadeh moved to extend the injunction to their cases. In April 1996, the district court found no "changed circumstances" to justify vacating the existing preliminary injunction; all the evidence could have been presented when the injunction was first adjudicated. Pet. App. 55a n.6. The district court nonetheless examined all of the new evidence, but found nothing "that could have led a reasonable person to believe that any of the plaintiffs had the specific intent to further the PFLP's unlawful aims." Pet. App. 75a n.14.¹⁰ Accordingly, the court denied the

¹⁰ Contrary to defendants' implications, Pet. Br. 11-12 n.6, the district court did not reject any of defendants' evidence on evidentiary grounds, nor did it require defendants to "follow the trail of the money" to establish specific intent. While it noted numerous problems with defendants' submission—including the fact that it was unclear that much of the evidence had been presented to the INS, or that it even existed, at the time the INS instituted deportation proceedings against plaintiffs (Pet. App. 58a, 62a)—the court considered all of the evidence. Pet. App. 56a, 60a. And while the court did note that the FBI had made no attempt to follow the money raised on behalf of a tax-exempt charitable institution, it did so simply to underscore by contrast what it found to be "a recurring feature of the government's submission[:] the making of conclusory assertions without any supporting evidence." Pet. App. 68a. It did not in any way suggest that such evidence was necessary to show specific intent.

motion to vacate and extended the injunction to Hamide and Shehadeh. Defendants appealed once again.

D. The Illegal Immigration Reform And Immigrant Responsibility Act Of 1996

While the second appeal was pending, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009. Among other things, IIRIRA enacted new judicial review procedures for future "removal" cases, and modified to some extent existing procedures for review of deportation and exclusion orders.

IIRIRA's new judicial review provision, 8 U.S.C. § 1252 (Supp. II 1996), retains the basic structure set forth under former 8 U.S.C. § 1105a (1994). Appellate review of final orders of removal remains governed by the procedures of the Hobbs Act, subject to a set of specified exceptions. 8 U.S.C. § 1252(a). As under § 1105a, one of the exceptions requires that the appeal be decided "only on the administrative record on which the order is based." 8 U.S.C. § 1252(b)(4). A new provision, § 1252(f), sets limits on injunctive relief, but expressly acknowledges the propriety of such relief "with respect to the application of [the removal provisions] to an individual alien against whom proceedings under such [removal provisions] have been initiated." Finally, just as former § 1105a(a)(1) provided that its jurisdictional scheme was "sole and exclusive," so new § 1252(g) provides that the new jurisdictional scheme set forth in § 1252 is "exclusive."¹¹

¹¹ 8 U.S.C. § 1252(g) (Supp. II 1996) provides:

Exclusive Jurisdiction. Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Congress further preserved the status quo by providing that for the most part, its IIRIRA amendments would not apply to deportation cases pending on April 1, 1997, the statute's effective date. IIRIRA, § 309(c)(1), 8 U.S.C. § 1101 note (Supp. II 1996). Review of pending cases continues to be governed by the former 8 U.S.C. § 1105a, subject to limited changes not pertinent here, unless the Attorney General elects to invoke the new judicial review procedures in any given case.¹² In light of this latter possibility, Congress provided that IIRIRA's "exclusive jurisdiction" provision, § 1252(g), "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." IIRIRA, § 306(c), 8 U.S.C. § 1252 note.

E. Litigation After IIRIRA

The government concedes that because plaintiffs' deportation cases were pending on April 1, 1997, most of IIRIRA's judicial review amendments do not apply. Pet. Br. 29-30. Nonetheless, invoking only the "exclusive jurisdiction" provision of IIRIRA, § 1252(g), the government filed a new motion to dismiss in the district court and a supplemental brief in the court of appeals, arguing that this provision divested the courts of jurisdiction.

Both the district court and the court of appeals rejected the government's reading of § 1252(g), reasoning that it would

¹² Section 309(c)(1) of IIRIRA provides that "[subject] to the succeeding provisions of this subsection," "the amendments made by this subtitle shall not apply" to pending cases, and "the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments." IIRIRA, § 309(c)(1), 8 U.S.C. § 1101 note. The "succeeding provisions" permit the Attorney General to elect to invoke the new law (including the judicial review provisions) in pending cases. IIRIRA, § 309(c)(2), (3). In addition, they outline limited "[t]ransitional changes in judicial review" that apply to judicial review of pending cases where the final order of deportation or exclusion is entered more than 30 days after IIRIRA's enactment. IIRIRA, § 309(c)(4).

deprive plaintiffs of *any* federal forum to litigate substantial First Amendment claims. Both courts once again found that plaintiffs would not be able to raise their selective enforcement claims on appellate review of a deportation order, because appellate review is limited by statute to the administrative record. Pet. App. 12a-13a, 40a-42a. For the same reason, both courts again rejected the government's suggestion that plaintiffs' claims could be developed through a transfer to district court under the Hobbs Act. Pet. App. 12a-13a, 42a. And both courts found that even if review were somehow available after the administrative process concluded, that avenue would deny plaintiffs any forum to redress their ongoing irreparable injuries to their First Amendment rights. Pet. App. 14a-15a, 38a-40a.

Accordingly, both courts followed the mandate that jurisdictional statutes should be read to preserve review of constitutional claims by construing IIRIRA to preserve district court jurisdiction for constitutional challenges, such as plaintiffs', for which there was otherwise no adequate review. Pet. App. 22a-43a; 6a-15a. The district court reasoned that because Congress did not specify that it intended § 1252(g) to bar all review of constitutional claims, and because plaintiffs' claims could not otherwise be reviewed, § 1252(g) should be interpreted not to apply to such claims. Pet. App. 42a.

The court of appeals took a different tack. It found that the government's reading of the statute, which would have § 1252(g) apply to pending cases without the rest of § 1252, would have the "absurd result" of barring all review of deportation orders in pending cases. Pet. App. 9a. Section 1252(g) bars judicial review "[e]xcept as provided in this section." 8 U.S.C. § 1252(g) (emphasis supplied). Since the government concedes that the rest of "this section," namely § 1252(a)-(f), does not apply to pending cases, § 1252(g) applied alone becomes a nullification of all review of pending deportation and exclusion cases. Pet. App. 11a. To avoid this result, the court of appeals held that "when it applies to pending cases,

(g) must apply along with at least some of the other provisions of section 1252, as amended by IIRIRA." *Id.* In particular, it held that § 1252(f) preserves jurisdiction over plaintiffs' claims, because it permits injunctive relief on behalf of "an individual alien against whom proceedings . . . have been initiated." 8 U.S.C. § 1252(f).

On the merits, the court of appeals upheld the injunction once again. It affirmed the district court's conclusion that no "changed circumstances" justified vacating the initial preliminary injunction. Pet. App. 17a. And it affirmed the extension of the injunction to Hamide and Shehadeh, based on the district court's unchallenged factual findings. Pet. App. 18a-21a.

This case has had a long and tortuous path. The government and its amici repeatedly imply that the delays in the deportation proceedings are attributable to the federal district court litigation, but that is demonstrably false. The *only* delay attributable to a federal court injunction began in April 1996, when the injunction was extended to Hamide and Shehadeh. The deportation proceedings began in 1987; the district court did not enjoin any deportation proceedings until 1994. The first injunction did not cause any delay, because it covered only the six plaintiffs other than Hamide and Shehadeh, and the government had already decided to defer the others' hearings until Hamide and Shehadeh's deportation hearing was completed. Yet in 1996, after nine *injunction-free* years, the INS had completed only one-quarter of Hamide and Shehadeh's deportation hearing. The delays in Hamide and Shehadeh's hearing, in turn, were caused by the INS's shifting charges, its delays in producing exculpatory evidence ordered by the immigration judge, and Congress's changes to the immigration laws, and not, as the government and its amici imply, by the federal injunction now under review.¹³

¹³ Indeed, the government is also responsible for much of the delay in the federal district court litigation. For example, the government chose as a matter of strategy to litigate and appeal the preliminary injunction

SUMMARY OF ARGUMENT

The undisputed findings in this case establish that the INS instituted deportation proceedings against plaintiffs in retaliation for their exercise of core First Amendment rights of political association. Plaintiffs sought injunctive relief in district court because they were suffering irreparable injuries, and because the district court was the *only* forum that could even address their claims, which required factual development beyond the administrative record. *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991); *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968).

Despite its initial concession that district court jurisdiction was proper, the government now argues that the federal courts have always been barred from providing plaintiffs in deportation proceedings with injunctive relief. In the government's view, an immigrant targeted for deportation because of her race, her gender, or her expression of religious beliefs must submit to years of administrative proceedings and irreparable injury before she may even present her constitutional claims to a court.

The government concedes that plaintiffs' claims must be subject to judicial review, that the claims require factual development that cannot be accomplished in an immigration proceeding, and that notwithstanding the enactment of IIRIRA, review of plaintiffs' deportation proceedings remains

in two stages, initially presenting only some of its evidence, and only after losing on appeal presenting some 10,000 additional pages, all of which could have been presented the first time around. Pet. App. 17a, 55a n.8. In addition, the government has delayed the discovery process by withholding clearly relevant evidence, only later submitting it as part of its own case. Pet. App. 52a-55a. This Court has stated that, ordinarily, delays in immigration cases benefit the alien, *INS v. Doherty*, 502 U.S. 314, 323 (1992), but that is certainly not the case here, where plaintiffs have been denied the right to engage in protected political activity for years, and need access to government records and officials to discover the facts necessary to vindicate their rights.

governed by former 8 U.S.C. § 1105a. Thus, unless courts of appeals under former § 1105a have jurisdiction to review claims requiring factual development outside the administrative record, the government's argument would leave plaintiffs with no forum to address constitutional claims, a result it admits is unacceptable.

In fact, because § 1105a limits appellate review of a deportation order to the administrative record created by the INS, claims requiring factfinding beyond the record are not cognizable under § 1105a, and must be filed in an original district court action. The government argues that appellate courts could transfer such claims to a district court for factfinding under the Hobbs Act, 28 U.S.C. § 2347(b)(3), but the same "administrative record" limitation precludes such transfers. As every court to address the question has held, facts developed by a district court would by definition be outside the administrative record, and therefore could not form the basis for appellate review under § 1105a.

Moreover, the transfer mechanism that the government proposes here was considered and *rejected* by Congress in enacting IIRIRA. Congress deleted a provision from the Senate bill that would have authorized district court transfers in the very situation presented here—constitutional claims requiring factfinding beyond the administrative record. Instead, it reenacted the "administrative record" language that had been uniformly interpreted to bar such transfers.

In addition, the government's proposal to re-route all claims requiring factfinding beyond the administrative record through a court of appeals before being transferred back to a district court would serve the purposes of neither the Hobbs Act nor the INA. It would require courts of appeals to do the work of trial courts, admitting and assessing evidence in the first instance on a regular basis, in order to determine whether a transfer is warranted. And it would only further delay the resolution of immigration cases. Collateral claims

now resolved in district court would still be litigated in district court, but only *after* an extra layer of threshold review in the court of appeals.

Even if plaintiffs' claims could somehow be considered on appellate review of a final deportation order, relegating plaintiffs to that post-deprivation remedy would still deny them meaningful review of their constitutional claims. Plaintiffs are suffering ongoing irreparable injury to their First Amendment rights. As long as they know the government has targeted them for their political associations and activities, they (and many others in the Palestinian community) are chilled from engaging in those activities, including such basic political rights as distributing literature, recruiting supporters, and communicating with associates. This Court has consistently recognized the necessity for timely judicial review where government action potentially infringes on First Amendment rights, and more generally, where irreparable injuries will otherwise go unredressed. In this context, review delayed is review denied.

IIRIRA does not change these conclusions. Because the government concedes that judicial review of plaintiffs' deportation proceedings is governed by former § 1105a, IIRIRA plays little or no independent role in this case. The government nonetheless maintains that a single provision of IIRIRA, 8 U.S.C. § 1252(g), applies here and bars district court jurisdiction. That reading must be rejected, because it would both deny meaningful judicial review of a constitutional claim and render the statute incoherent. Section 1252(g), entitled "Exclusive Jurisdiction," bars review of claims arising from "decisions to commence proceedings, adjudicate cases, or execute removal orders" except as provided "in this section." Yet on the government's reading, § 1252(g) would apply to pending cases without the remainder of the section, § 1252(a)-(f), to which it refers. On that reading, it literally becomes a nullification of all jurisdiction.

Plaintiffs' interpretation of § 1252(g), by contrast, preserves review of claims that cannot be adequately addressed on appellate review, and makes sense of § 1252(g). Plaintiffs maintain that § 1252(g) was intended to apply to claims arising from pending deportation proceedings only where the Attorney General invokes the whole of the new § 1252 judicial review scheme pursuant to §§ 309(c)(2) and (c)(3) of IIRIRA. When she does so, § 1252(g) applies retroactively, "without limitation to claims arising from all past [and] pending" proceedings. On this reading, § 1252(g) applies only when the rest of § 1252 applies, and the statute operates as the "exclusive jurisdiction" Congress intended, rather than as a negation of jurisdiction that no one could have intended.

Alternatively, if § 1252(g) is read to apply to pending cases, it must be interpreted not to bar judicial review of constitutional claims that cannot otherwise be meaningfully reviewed. Section 1252(g) does not expressly refer to constitutional claims, and there is no "clear and convincing evidence" that Congress intended to bar review of constitutional claims in pending cases. Both of these readings are reinforced by analysis of the whole of § 1252, which codifies the approach that this Court and lower courts consistently took under § 1105a in finding district court jurisdiction proper where claims could not be adequately addressed under § 1105a itself.

Plaintiffs' interpretation will neither open the floodgates to district court litigation, nor delay immigration processing. It applies only to a narrow set of cases, those instituted prior to April 1, 1997. And it simply maintains the status quo. Under uniform judicial interpretation of § 1105a, the vast majority of issues arising in deportation proceedings were reviewable exclusively in the court of appeals. Only those issues that could not be adequately reviewed on a petition for review could be litigated in district court. That scheme has not imposed an undue burden on the courts, nor led to unwarranted delays, and Congress in IIRIRA made no suggestion that it disapproved of that scheme.

ARGUMENT

I. THE APPLICABLE STATUTES SHOULD BE INTERPRETED TO PRESERVE MEANINGFUL JUDICIAL REVIEW OF PLAINTIFFS' CONSTITUTIONAL CLAIMS

The issue presented for review is whether, in light of IIRIRA, immigrants who have been targeted for deportation in retaliation for exercising constitutionally protected rights of speech and association have the right to seek timely judicial relief from a district court.¹⁴ The government concedes that plaintiffs' constitutional claims must be reviewable, Pet. Br. 36, that judicial review of plaintiffs' deportation proceedings is still governed by former 8 U.S.C. § 1105a, Pet. Br. 30-31 n.15, and that plaintiffs' claims require factfinding that cannot be accomplished through the administrative process. Pet. Br. 38. But as both lower courts held, claims requiring factfinding beyond the administrative record *cannot* be reviewed under § 1105a, and therefore unless plaintiffs can bring an original action in district court pursuant to 28 U.S.C. § 1331 and 8 U.S.C. § 1329, they will be deprived of any forum whatsoever to resolve substantial constitutional claims.

A "serious constitutional question" . . . would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Accord-

¹⁴ Every judge to review the record has agreed that plaintiffs are likely to succeed on their claim that the government selectively targeted them in violation of the First Amendment. The government sought certiorari on that issue, but that issue is not presented here because the Court limited its grant to the jurisdictional issue. Even in the absence of the unanimous judicial assessment of plaintiffs' First Amendment claims, the Court would have to assume that plaintiffs' allegations are true for purposes of deciding the jurisdictional issue presented here. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

ingly, absent "clear and convincing evidence" to the contrary, jurisdictional statutes must be construed to preserve meaningful review of constitutional claims. *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974). In *Johnson*, for example, this Court interpreted a statute that on its face barred *all* judicial review of veterans' benefits determinations to permit judicial review of constitutional challenges arising from benefits claims.¹⁵ As one commentator has described it, the Court employs "a superstrong presumption against preclusion of constitutional claims." Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 Minn. L. Rev. 689, 730-31 (1990).

The government asserts that this doctrine is not directly implicated here because under its reading of § 1105a, plaintiffs may obtain judicial review of their First Amendment claims on appeal of a final deportation order, and can develop the necessary facts through a transfer to district court under an obscure provision of the Hobbs Act, 28 U.S.C. § 2347(b)(3). But § 1105a and the Hobbs Act both preclude use of the transfer mechanism in review of deportation orders. Moreover, in enacting IIRIRA, Congress considered and rejected the very transfer mechanism the government now urges the Court to find was always available—a district court transfer for constitutional claims requiring factual development beyond the administrative record. *See infra* Section I.A.2. Thus, the only mechanism for factfinding the government has identified is unavailable, and to deny district court review would in fact preclude *all* review of plaintiffs' constitutional claims.

Even if review at the end of the administrative process were available, the government's position would still raise serious

¹⁵ *Id.* at 365; *see also Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 n.3 (1985) (same); *Webster v. Doe*, 486 U.S. 592 (1988) (interpreting the National Security Act of 1947, which appeared to preclude all judicial review of CIA employment decisions, to preserve review of constitutional challenges to such decisions).

constitutional questions. Because plaintiffs are suffering irreparable injuries to their First Amendment rights now, meaningful judicial review cannot be afforded years later. *See infra* Section I.B.

A. Meaningful Judicial Review Requires District Court Jurisdiction Because Plaintiffs' Claims Require Factual Development Beyond The Administrative Record

The first reason that plaintiffs' claims must be heard in district court is that plaintiffs have nowhere else to go. As the record below—already exceeding 11,000 pages of evidence at the preliminary injunction stage—illustrates, plaintiffs' claims require extensive factual development. Much of this evidence was produced in court-ordered discovery, including voluminous government documents confirming that plaintiffs were targeted for constitutionally protected associational activity. As the government admits, these facts cannot be developed in the immigration proceeding because immigration judges have no authority to review the District Director's discretionary decision to institute deportation proceedings. *See supra* note 3. Because appellate review is limited to the administrative record, these claims also cannot be reviewed by a court of appeals on review of a final deportation order under 8 U.S.C. § 1105a. For that reason, as the government originally conceded, *see supra* note 2, jurisdiction lies in district court.

1. Under The Uniform Judicial Interpretation Of 8 U.S.C. § 1105a, District Courts Have Jurisdiction To Review Claims That Require Factfinding Beyond The Administrative Record

The government concedes that 8 U.S.C. § 1105a (1994), which governed review of deportation proceedings when this case began, still governs judicial review of plaintiffs' deportation cases, because they were commenced prior to April 1, 1997. Pet. Br. 12, 17, 30-31 n.15.¹⁶ Under Section 1105a, it is well established—indeed uniformly held—that claims requiring factfinding beyond the administrative record cannot be reviewed on appeal of a deportation order, and therefore are appropriately heard only in district court.

Section 1105a establishes “sole and exclusive” jurisdiction in the court of appeals for all claims that can be heard on review of a final order of deportation. *Cheng Fan Kwok v. INS*, 392 U.S. 206, 209-10 (1968). But where an alien asserts a claim that is beyond the scope of appellate review under § 1105a, “the provisions of [§ 1105a] are inapplicable, [and]

¹⁶ This concession suggests that certiorari may have been improvidently granted. In granting certiorari, this Court specifically rewrote the question presented to ask whether, “in light of [IIRIRA], the courts below had jurisdiction to entertain respondents’ challenge prior to the entry of a final order of deportation.” 118 S. Ct. 2059 (1998) (emphasis added). But it is now clear that even on the government’s view, IIRIRA has little or no effect on this case, as review of plaintiffs’ claims is still governed by the former § 1105a. The only relevant IIRIRA provision that the government even claims applies here is 8 U.S.C. § 1252(g), and the government maintains that that provision does not change anything, but merely “reinforces the rule that judicial review is available to such aliens only as provided in 8 U.S.C. § 1105a itself.” Pet. Br. 30-31 n.15. Thus, this case does not present the issue of how IIRIRA applies prospectively, and the government’s case stands or falls on whether there is adequate review of plaintiffs’ claims under former § 1105a. The case may therefore not present the question the Court thought it did when it granted certiorari, and if so, certiorari should be dismissed as improvidently granted.

the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Id.* at 210.¹⁷

One category of challenges not cognizable on a § 1105a petition for review, and therefore cognizable only in district court under 28 U.S.C. § 1331 and 8 U.S.C. § 1329, are claims requiring factfinding beyond the administrative record. A court of appeals cannot review such claims because its determination must be based "solely upon the administrative record upon which the deportation order is based." 8 U.S.C. § 1105a(a)(4).¹⁸

This Court so held in *McNary v. Haitian Refugee Center*, 498 U.S. 479, 497 (1991). The statute at issue limited appeals of legalization decisions to petitions for review of final deportation orders under § 1105a. The Court held that this exclusive appellate review scheme did not apply to a challenge to the INS's procedures and practices in adjudicating legalization applications, because the challenge required factual devel-

¹⁷ See also *INS v. Stanisic*, 395 U.S. 62, 68 n.6 (1969). As the Tenth Circuit explained the unanimous state of the law under § 1105a:

[T]he current state of the law concerning review of deportation decisions is that, if the tests are met for review by this court under [§ 1105a], the district court has no jurisdiction to review such issues. If the issues do not meet the jurisdictional tests of [§ 1105a], we have no authority to review them under auspices of that section, and exclusive jurisdiction for initial review of those issues lies in the district court.

Olaniyan v. District Director, INS, 796 F.2d 373, 376-77 (10th Cir. 1986) (original emphasis); see also *Gottesman v. INS*, 33 F.3d 383, 387 (4th Cir. 1994) (same) (collecting cases); *Fatehi v. INS*, 729 F.2d 1086, 1088 (6th Cir. 1984).

¹⁸ See, e.g., *Yi v. Maugans*, 24 F.3d 500, 506 (3d Cir. 1994); *Olaniyan v. District Director, INS*, 796 F.2d at 376; *Abedi-Tajrishi v. INS*, 752 F.2d 441, 443-44 (9th Cir. 1985); *Jean v. Nelson*, 727 F.2d 957, 980-81 (11th Cir. 1984) (en banc), *aff'd on other grounds*, 472 U.S. 846 (1985); *Mahammadi-Motlagh v. INS*, 727 F.2d 1450, 1452-53 (9th Cir. 1984); *Toolee v. INS*, 722 F.2d 1434, 1437 (9th Cir. 1983); *Fleurinor v. INS*, 585 F.2d 129, 135-36 & n.6 (5th Cir. 1978).

opment beyond the scope of the administrative process. Noting that the statute required appellate review to be "based solely upon the administrative record," the Court held that "[b]ecause the administrative appeals process does not address the kind of procedural and constitutional claims respondents bring in this action, limiting judicial review of these claims [to the court of appeals] is not contemplated by the language of [the statute]." 498 U.S. at 493. Thus, if "not allowed to pursue their claims in District Court, respondents would not as a practical matter be able to obtain meaningful judicial review." *Id.* at 497.

Like the claims in *McNary*, plaintiffs' claims require factfinding beyond the administrative record, and therefore cannot be reviewed under § 1105a; consequently, they are properly cognizable in district court. The law on this question was so well settled that the government acknowledged that district court jurisdiction was proper when this case began. Reversing itself, the government now argues that § 1105a has always precluded district court review. Pet. Br. 20-24. But remarkably, it cites only *one* immigration case for this proposition, *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996), and that case supports plaintiffs' view. The court in *Massieu* held that a facial constitutional challenge to an immigration statute could be heard on appellate review under § 1105a because it required no factfinding beyond the administrative record. 91 F.3d at 422-24. In doing so, the court cited and followed *McNary* and its own prior decision in *Yi v. Maugans*, 24 F.3d at 506, both of which held that district courts have jurisdiction to hear claims requiring factfinding beyond the administrative record, because such claims *cannot* be heard on § 1105a review.¹⁹

¹⁹ The Third Circuit's opinions are consistent with *INS v. Chadha*, 462 U.S. 919 (1983), which authorized appellate review under § 1105a of a facial challenge to a legislative veto provision, a claim which, like *Massieu* and unlike *McNary* and this case, required no factfinding beyond the administrative record.

Thus, under § 1105a, which the government concedes still governs judicial review of plaintiffs' deportation cases, the courts have uniformly held that claims requiring factual development beyond the administrative record cannot be heard on direct appellate review of a deportation order, and must therefore be filed in district court.

2. Under Both 8 U.S.C. § 1105a and IIRIRA, Courts Of Appeals May Not Transfer Claims Requiring Factfinding Beyond The Administrative Record To District Courts For Factfinding

Notwithstanding its earlier concession and the above uniform precedent, the government now argues that claims requiring factfinding are cognizable only on § 1105a appellate review of a final deportation order, and that any factual development can be obtained through a transfer to district court under a rarely used provision of the Hobbs Act, 28 U.S.C. § 2347(b)(3). The government's argument fails for four reasons.

First, § 1105a precludes the district court transfer that the government now suggests would be available. Although § 1105a directs that appeals of deportation orders are to be conducted pursuant to Hobbs Act procedures, it does so subject to the specific qualification that, except for nationality claims, "the petition shall be determined solely upon the administrative record upon which the deportation order is based." 8 U.S.C. § 1105a(a)(4). As every court to address the issue has held, that qualification precludes a court of appeals from transferring a matter to district court for factual development.²⁰ Any facts developed in district court would by

²⁰ *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997) (Pet. App. 12a-13a); *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1057 (9th Cir. 1995) (Pet. App. 91a); *Ghorbani v. INS*, 686 F.2d 784, 787 n.4 (9th Cir. 1982) (statutory provision limiting appellate review to the administrative record

definition be outside the administrative record, and therefore could not form the basis for an appellate court's decision under § 1105a(a)(4). Not surprisingly, this provision has *never* been used in appellate review of a deportation order, even though such appeals have been subject to the Hobbs Act since 1961, when Congress enacted § 1105a.

This reading is buttressed by the fact that the only exception § 1105a makes to the requirement that petitions be determined "solely upon the administrative record" is for nationality claims. 8 U.S.C. § 1105a(a)(4). These claims are to be transferred to a district court for factfinding. 8 U.S.C. § 1105a(a)(5). Thus, where Congress intended to provide for transfers to district court, it did so explicitly. It pointedly did not authorize such transfers for issues requiring factfinding beyond the administrative record, as the government now advocates.

If the government's view of § 1105a were correct, all of the cases discussed above finding district court jurisdiction available for claims requiring factfinding beyond the administrative record would have been wrongly decided, including *McNary*, 498 U.S. 479. *See supra* Section I.A.1. On the government's view, the court of appeals would have had exclusive jurisdiction under § 1105a, and the facts could have been developed *only* on a Hobbs Act transfer to district court. In *McNary*, the government made precisely this argument, citing the Hobbs Act transfer provision as the proper mechanism for developing necessary facts. Reply Br. for Petitioners in *McNary* at 9. Yet the Court was unpersuaded, and held that limiting plaintiffs to the § 1105a appeal process would be "the

"precludes application of the procedures of the Hobbs Act that permit transfer of a case to a district court for a hearing"; *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1977); *see also Osaghae v. INS*, 942 F.2d 1160, 1162 (7th Cir. 1991) (statutory provision limiting appellate review to the administrative record means that "we are not to take evidence and base our decision on some mixture of that evidence with the evidence that was before the Board"); *Makonnen v. INS*, 44 F.3d 1378, 1385 (8th Cir. 1995) (same).

practical equivalent of a total denial of judicial review of generic constitutional and statutory claims.” 498 U.S. at 497.

Second, in enacting IIRIRA, Congress expressly rejected a proposal to permit district court transfers for constitutional claims, and instead re-enacted the very language that the courts had interpreted to bar such transfers. The version of the bill passed by the Senate contained the following provision:

If a petition filed under this section raises a *Constitutional issue that the court of appeals finds presents a genuine issue of material fact that cannot be resolved on the basis of the administrative record*, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides or is detained for a new hearing on the Constitutional claim as if the proceedings were originally initiated in district court.

S. 1664, § 142(a) (passed by Senate, May 2, 1996) (emphasis added). The House bill did not contain this provision, however, and the Conference Committee deleted it. Thus, against a backdrop of consistent judicial decisions holding that § 1105a’s “administrative record” language barred transfers to district court, Congress expressly rejected a proposal to authorize such transfers *for constitutional issues*—the very proposal the government now urges this Court to adopt as a matter of statutory construction. “‘Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.’” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).²¹

²¹ See also *Lonchar v. Thomas*, 517 U.S. 314, 327 (1996) (courts should not read habeas statute to impose a requirement that Congress expressly “rejected, by removing [it] from the draft Rule”) (original emphasis); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 561 (1985) (rejecting proffered interpretation of statute where

Moreover, in rejecting the transfer proposal for constitutional issues, Congress re-enacted the language that courts had uniformly interpreted to bar district court transfers, *see* 8 U.S.C. §§ 1252(b)(4), (5), thus adopting that interpretation. “Congress is presumed to be aware of . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Bragdon v. Abbott*, ___ U.S. ___, 118 S. Ct. 2196, 2208 (1998) (same).²²

Third, the Hobbs Act itself independently precludes a district court transfer in an appeal from a deportation order. The district court transfer provision was designed to address a very narrow set of final agency orders—those issued without holding a hearing—and therefore permits district court transfers *only* where “the agency has not held a hearing” and “a hearing is not required by law.” 28 U.S.C. § 2347(b)(3). Since § 1105a(a) adopts Hobbs Act procedures only for “judicial review of all final orders of deportation,” and a hearing is “required by law” before a deportation order is entered,

legislative history indicated that Congress had considered and rejected that approach).

²² The government is left to argue that a negative inference in support of its view should be drawn from IIRIRA’s provision barring remands to the agency under 28 U.S.C. § 2347(c). 8 U.S.C. § 1252(a)(1). Pet. Br. 46-47. Even if such an inference were warranted, it would hardly overcome Congress’s explicit rejection of the transfer option and re-enactment of the “administrative record” language. In any event, as the court of appeals explained, the inference is wholly unwarranted. Pet. App. 13a-14a. The reason Congress specifically barred remands to the INS under § 2347(c) without mentioning transfers to district court under § 2347(b)(3) is simple—the state of the law was that § 2347(b)(3) transfers to the district court were already barred by the “administrative record” language, but remands to the agency under § 2347(c) were permitted (over INS’s objections). *See, e.g., Makonnen*, 44 F.3d at 1385; *Osaghae*, 942 F.2d at 1162; *Coriolan*, 559 F.2d at 1003. Since § 2347(b)(3) transfers were already unavailable, Congress needed to do no more than re-enact the “administrative record” limitation.

8 U.S.C. § 1252(b), the Hobbs Act itself bars a transfer to district court in this setting.²³

Fourth, channeling collateral challenges through § 2347(b)(3) would also undermine Congress's purposes in enacting both the Hobbs Act and the INA. The Hobbs Act transferred appeals of administrative agency orders from three-judge district courts to the courts of appeals because such appeals generally do not require independent factual development. S. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950). Section 2347(b)(3) was added only for the rare situation in which an agency issued a reviewable order without holding a hearing, the law did not require a hearing, and there were facts in dispute—a situation so rare that it has happened only once in the thousands of appeals that have been decided in the almost 50 years since the Hobbs Act became law.²⁴ On the government's view, however, deciding whether to transfer a matter under § 2347(b)(3) would become a routine part of appellate courts' work in immigration cases. Every time a collateral issue arose—and as *Cheng Fan Kwok's* progeny illustrates, there are many such issues—appellate courts would have to assess newly presented evidence in the first instance, presumably sometimes including oral testimony, in order to determine whether to transfer to district court for factfinding. In this

²³ For the same reason, the Hobbs Act's requirement that review be limited to the administrative record is quite different from the INA's requirement. Cf. Pet. Br. 47 n.22. The Hobbs Act limits review to the administrative record only "when the agency has held a hearing," 28 U.S.C. § 2347(a), and permits district court transfers only where there has been no hearing, and no hearing is required by law. 28 U.S.C. § 2347(b)(3). By contrast, the INA limits *all* petitions for review of deportation orders to the administrative record, subject only to a single exception for claims of nationality. 8 U.S.C. § 1105a(a)(4).

²⁴ *Lake Carriers' Ass'n v. United States*, 414 F.2d 567 (6th Cir. 1969) (transferring to district court where FCC held no hearing before issuing order appealed from, a hearing was not required by law, and there was genuine issue of material fact regarding effect of order on navigational safety).

case, for example, the district court reviewed hundreds of pages of evidence before authorizing discovery, and reviewed over 11,000 pages before extending the injunction to plaintiffs Hamide and Shehadeh. Admitting and assessing evidence in the first instance is the kind of work suited to trial courts, not courts of appeals.

Nor would § 2347(b)(3) transfers serve Congress's interests in streamlining review of deportation orders. All claims that are now litigated in district court would still be litigated in district court. The government's proposal would simply add an additional layer of review and delay, by requiring courts of appeals to routinely make threshold determinations to transfer. In this case, for example, since plaintiffs have already established a *prima facie* case that they have been singled out in retaliation for First Amendment activities, a § 2347(b)(3) transfer would be inevitable. Thus, they would be back in district court, precisely where they are today, only years later. During the delay, moreover, not only would plaintiffs suffer irreparable injuries, but they would almost certainly lose access to valuable evidence, thereby prejudicing their ability to prove their claims.²⁵

²⁵ In the unlikely event that plaintiffs' deportation proceedings were resolved in their favor on statutory grounds, the government's proposal would afford them no opportunity to vindicate their constitutional rights. Plaintiffs allege that the government has targeted them in retaliation for their First Amendment activities. Since the government has stated that it seeks their deportation because of their political associations, and would remain free to institute future deportation proceedings against them, plaintiffs would be entitled to an injunction barring the government from bringing any future proceedings against them in retaliation for their First Amendment activities even if they were to prevail in the current deportation proceedings on statutory grounds.

B. Meaningful Judicial Review Requires Timely Access to District Court Because Plaintiffs Are Suffering Irreparable Injuries To Their First Amendment Rights

Even if plaintiffs' claims could be addressed after entry of a final deportation order, such a remedy would be insufficient where, as here, the proceedings were instituted in retaliation for the exercise of First Amendment rights. Such review is patently inadequate, because it would leave plaintiffs with no judicial recourse for their irreparable First Amendment injuries for the many years that the administrative process takes.²⁶ "[T]he loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Because plaintiffs' First Amendment irreparable injuries "cannot be vindicated by post-deprivation remedies," timely judicial review is required here. Pet. App. 92a, 14a-15a.

²⁶ Plaintiffs Hamide and Shehadeh's deportation hearing alone has already lasted many years and was less than one-quarter completed when the district court enjoined it in 1996. Immigration hearings routinely take many years to complete from the issuance of the Order to Show Cause, and appeals to the BIA also frequently take many years. See, e.g., *Rodriguez-Barajas v. INS*, 992 F.2d 94, 97 (7th Cir. 1993) (noting that BIA did not explain nearly seven-year delay in deciding administrative appeal); *Osmani v. INS*, 14 F.3d 13, 14 (7th Cir. 1994) (BIA took four years to decide administrative appeal, and four more years to decide motion to reopen); *Ghaly v. INS*, 58 F.3d 1425, 1428 (9th Cir. 1995) (BIA dismissed appeal "after six years of inexplicable delay"); *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995) (Posner, J.) (noting that BIA is chronically understaffed, and that INS proceedings are "notorious for delay"); *id.* at 452 (Easterbrook, dissenting) (noting that delay in deporting Salameda was 13 years "and counting"). Hamide and Shehadeh's case, which has already generated more than 6,000 transcript pages and hundreds of exhibits, is far more complex than the average deportation case, and is therefore likely to take even longer than usual to resolve. And because the other plaintiffs' deportation hearings will follow Hamide and Shehadeh's proceeding, the delay for them will be even longer.

Few principles are more basic to First Amendment jurisprudence than the notion that First Amendment claims require prompt judicial review. The Court has held that the failure to provide prompt judicial review invalidates state procedures for regulating obscenity and allocating access to a municipal theater.²⁷ The same principle has led the Court to interpret the statute limiting its own jurisdiction, 28 U.S.C. § 1257, to permit review of otherwise non-final judgments where leaving important First Amendment issues unresolved would chill protected expression.²⁸ Similar concerns explain the Court's willingness to entertain pre-enforcement challenges to overbroad statutes that threaten speech and associational rights.²⁹

²⁷ *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561-62 (1975). As the government notes, the retaliatory filing of deportation charges is not, strictly speaking, a prior restraint. Pet. Br. 42. But such retaliatory action has many of the same effects and should raise the same concerns as do prior restraints. Instituting civil deportation proceedings is even easier than seeking a civil injunction against speech, and therefore at least equally subject to abuse as a formal prior restraint. No less than an injunction, seizure, or permit denial, the institution of deportation charges based on political activities for all practical purposes prospectively bars the individuals targeted (and others associated with them) from engaging in such activities. And because the immigration judge cannot review the selective enforcement claims, plaintiffs are left without recourse to adjudicate their First Amendment rights.

²⁸ *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 55-57 (1989); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 246-47 & n.6 (1974); *Mills v. Alabama*, 384 U.S. 214, 221-22 (1966) (Douglas, J., concurring).

²⁹ *Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977) (First Amendment overbreadth doctrine is based on concern that "[a]n overbroad statute might serve to chill protected speech"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (under First Amendment overbreadth doctrine, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression").

Each of these doctrines is predicated on the recognition that First Amendment rights are easily deterred, that the rights of all of us are diminished if some are chilled from protected expression, and that timely judicial resolution is therefore constitutionally required.³⁰

The Court acknowledged that this principle applies to judicial review of administrative agency actions threatening First Amendment rights in *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968). Section 10(b)(3) of the Selective Service Act barred any judicial review of a selective service classification decision prior to induction. Oestereich, a theology student, claimed that the Selective Service Board had illegally reclassified him for returning his draft card to protest the Vietnam War. The Court held that pre-induction review was warranted because the Board's "basically lawless" decision was "no different in constitutional implications from a case where induction of an ordained minister or other clearly exempt person is ordered . . . to retaliate against the person because of his political views." 393 U.S. at 237. Two unanimous courts of appeals came to the same conclusion, including the Second Circuit, in a decision joined by Judge Friendly. *Wolff v. Selective Service Local Board No. 16*, 372 F.2d 817, 823 (2d Cir. 1967) (holding that pre-induction review was necessary where individuals were reclassified in retaliation for their speech because "[t]he effect of the reclassification itself is immediately to curtail the exercise of First Amendment rights."); *National Student Ass'n v. Hershey*, 412 F.2d 1103, 1108-15 (D.C. Cir. 1969) (same).

The necessity of prompt judicial review for First Amendment claims also informs this Court's *Younger* abstention

³⁰ See generally Henry Monaghan, *First Amendment "Due Process"*, 83 Harv. L. Rev. 518, 550-51 (1970) ("the view that the first amendment has important remedial consequences for the federal courts also necessarily calls into question the validity of congressionally imposed jurisdictional limitations in the first amendment area").

jurisprudence. *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention, which holds that federal courts should not enjoin ongoing state criminal, civil and administrative proceedings furthering vital state interests, applies *only if the state proceedings afford an opportunity to present the individuals' constitutional claims*. Thus, in *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432, 435-36 (1982), the Court extended *Younger* abstention to a state disciplinary proceeding only upon finding that the lawyer subject to discipline had an adequate opportunity to resolve his First Amendment claims within the disciplinary proceedings. The "pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims." *Id.* at 432 (quoting *Moore v. Sims*, 442 U.S. 415, 430 (1979)). Where constitutional claims cannot be presented in the state proceeding, abstention is improper. See, e.g. *Gibson v. Berryhill*, 411 U.S. 564, 577 (1973) (declining to apply *Younger* to civil administrative proceeding, because *Younger* dismissal "naturally presupposes the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved"); *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975) (*Younger* does not apply because claim cannot be presented in defense to criminal proceeding).

Even where a state tribunal can consider constitutional challenges, the Court permits federal injunctions where proceedings are brought to retaliate against the exercise of First Amendment rights. *Younger*, 401 U.S. at 48; *Dombrowski v. Pfister*, 380 U.S. 479, 485-90 (1965); *Llewellyn v. Raff*, 843 F.2d 1103, 1109 (8th Cir. 1988), *cert. denied*, 489 U.S. 1032 (1989). In *Dombrowski*, this Court held that immediate federal intervention was appropriate to remedy the chilling effect of having to undergo criminal proceedings brought "to discourage appellants' civil rights activities." 380 U.S. at 490. While the Court subsequently narrowed *Dombrowski*'s broader dicta, *Younger*, 401 U.S. at 53-54, it simultaneously emphasized that federal injunctive relief is available where

prosecutions are brought to retaliate against the exercise of First Amendment rights. 401 U.S. at 48.³¹

The government argues that these First Amendment principles do not permit a federal court to "disregard express statutory limits on its own jurisdiction whenever delay in the resolution of disputed legal issues might temporarily discourage the exercise of First Amendment rights." Pet. Br. 42. But plaintiffs do not ask this Court to "disregard express statutory limits," but rather to interpret the statutory scheme to avoid "serious constitutional questions" by preserving meaningful and timely judicial review of a constitutional claim. At a minimum, the above cases establish that a statute that barred a person targeted in retaliation for his political speech and association from seeking timely injunctive relief would raise a serious constitutional question, and that principle must guide this Court's interpretation of the relevant statutes.

Moreover, while it is true that defendants in administrative or judicial proceedings must often "litigate the case to its

³¹ Relying on dicta from *Cameron v. Johnson*, 390 U.S. 611 (1968), the government maintains that federal intervention in a state criminal proceeding requires a showing that prosecutors have no expectation of obtaining a conviction. Pet. Br. 41. That is plainly wrong. Subsequent cases have made clear that federal intervention is appropriate if there is bad faith, harassment, or "extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment." *Moore v. Sims*, 442 U.S. 415, 432-33 (1979). The government cannot seriously contend that a defendant who could show that his state tax prosecution had been brought because he had spoken out in favor of campaign finance reform would be barred from seeking federal injunctive relief if the tax charge was arguable. See *Lewellen v. Raff*, 843 F.2d at 1109 (a prosecution brought in retaliation for First Amendment rights constitutes "bad faith," whether or not there is a basis for a conviction); *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981) (same); *Bishop v. State Bar of Texas*, 736 F.2d 292, 294 (5th Cir. 1984) (same); *Wichert v. Walter*, 606 F. Supp. 1516, 1521, 1525 (D.N.J. 1985) (finding bad faith where state disciplinary proceeding instituted in retaliation for plaintiff's speech).

conclusion, even where the gravamen of his claim is that the prosecution was unlawfully brought in the first instance," Pet. Br. 34-35, it is also true that where irreparable injury would result, the Court has authorized timely judicial intervention. In none of the cases on which the government or amici rely was any party denied a timely opportunity to seek relief for irreparable constitutional injuries. In *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982), for example, defendants had immediate access to a federal district court to raise their claim (that they were prosecuted vindictively for exercising their right to seek a change of venue) in the first instance. The only issue was the timing of appellate review, and this Court simply held that an interlocutory appeal was not available where a delay in resolution would cause no irreparable injury. *Federal Trade Comm. v. Standard Oil of California*, 449 U.S. 232 (1980), involved no constitutional claim at all, but simply a charge that antitrust proceedings had been instituted without sufficient evidence. Had Standard Oil shown that the FTC had instituted antitrust proceedings in retaliation for Standard Oil's support of the Republican Party, it would have been a very different case.

Where parties in administrative proceedings would suffer irreparable injury absent timely judicial intervention, the Court has not hesitated to authorize such intervention, even in the face of statutes otherwise barring review before the proceedings are completed. For example, although Section 205(g) of the Social Security Act makes a final decision denying benefits a "statutorily specified jurisdictional prerequisite" to judicial review, *Weinberger v. Salfi*, 422 U.S. 749, 766-67 (1975), the Court has excused the "final decision" requirement where the claimant faces irreparable injury. *Bowen v. City of New York*, 476 U.S. 467, 482-86 (1986); *Mathews v. Eldridge*, 424 U.S. 319 (1976). "[T]he core principle [is] that statutorily created finality requirements should, if possible, be construed so as not to cause crucial collateral

claims to be lost and potentially irreparable injuries to be suffered." *Mathews*, 424 U.S. at 331 n.11; *see also Rafeedie v. INS*, 880 F.2d 506, 526-29 (D.C. Cir. 1989) (Ginsburg, R., J., concurring) (applying same principles to § 1105a).

The government remarkably seeks to dismiss plaintiffs' irreparable First Amendment injuries as somehow irrational or unfounded. It suggests that plaintiffs—who have been told by the FBI Director and other officials that they were targeted in retaliation for their political activities and associations, J.A. 67, 72, 93-94—have no reason to change their behavior. Pet. Br. 43. This simply ignores reality. A rational immigrant will assume that if he continues to engage in those activities, it will only strengthen the government's resolve to deport him, whereas if he terminates the offending conduct, the government may well treat him like the many similarly situated aliens it has *not* sought to deport. Aliens in deportation cases, moreover, are peculiarly at the INS's mercy; the INS may, in its discretion, decide to detain them without bond at any time, drop the deportation proceedings altogether, and grant or deny them relief from deportation. As the lower courts found, plaintiffs have been chilled from engaging in the very political activity that sparked the government's action. *See Statement, supra*, p. 7.³²

Irreparable injuries requiring injunctive relief prior to review of a final deportation order are likely to be rare. But if any case qualifies for such treatment, it is a proceeding

³² Finally, the government argues that to the extent plaintiffs are chilled, the chill stems not only from this proceeding, but from an Executive Order and statute that make it a crime to provide material support to designated foreign terrorist groups. Pet. Br. 43 and n.19. But the government has admitted to targeting plaintiffs for a wide range of associational activity other than material support—including distribution of literature, recruiting other members, communicating with other members, and membership itself. *See Statement supra*, p. 5. As a result of this proceeding, and solely as a result of this proceeding, plaintiffs have been deterred from these activities, all of which are otherwise wholly lawful.

instituted in retaliation for the exercise of First Amendment rights. If an administrative agency instituted proceedings against a citizen for such a blatantly unconstitutional retaliatory motive, judicial relief would be swift and certain. Aliens deserve no less.³³

II. SECTION 1252(g) DOES NOT APPLY TO PLAINTIFFS' SELECTIVE ENFORCEMENT CLAIMS

As noted above, since the government concedes that plaintiffs' deportation cases will be reviewed under the former § 1105a, and that plaintiffs' claims must be subject to judicial review, its invocation of a single provision of IIRIRA, 8 U.S.C. § 1252(g), is of little relevance. Either plaintiffs' claims can be adequately reviewed on appellate review under the prior § 1105a, in which case they must be heard there, or they cannot be adequately reviewed there, in which case they

³³ For the same reasons, habeas corpus review would be insufficient to address plaintiffs' ongoing First Amendment injuries. Pet. App. 14a-15a. Moreover, if the existence of habeas jurisdiction somehow barred original district court jurisdiction for collateral claims that cannot be addressed on § 1105a review, then *Cheng Fan Kwok*, *Stanisic*, and *McNary* would all have been wrongly decided.

Indeed, the government maintains that there is no habeas district court jurisdiction remaining after IIRIRA. Pet. Br. 45 n.20. The government cites cases now being litigated in dozens of lower courts involving the very different question of whether habeas is available for aliens who have been found deportable for certain crimes, have exhausted all administrative review, and face a jurisdictional bar on appellate review of their final deportation orders. The issue of what habeas corpus review remains where direct review is affirmatively prohibited raises a separate set of statutory and constitutional questions under 28 U.S.C. § 2241, the Due Process Clause, and the Suspension Clause. *See, e.g., Magana-Pizano v. INS*, 1998 WL 55011 (9th Cir. Sept. 1, 1998) (holding that aliens subject to bar on direct appellate review of deportation orders are constitutionally entitled to habeas review of their constitutional and statutory claims); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998) (holding as matter of statutory interpretation that habeas corpus review remains under 28 U.S.C. § 2241). *See generally* Amicus Br. of National Immigration Law Center.

must be reviewable in district court under general federal question jurisdiction. Thus, even on the government's view, it is unclear what, if anything, § 1252(g) adds to the resolution of this case.

The government argues that § 1252(g) applies here, but cannot then be read literally because it would have the anomalous result of barring *all* judicial review of most immigration actions in pending deportation cases. This is because § 1252(g) authorizes review only as provided in §§ 1252(a)-(f), but IIRIRA's effective date provisions dictate that §§ 1252(a)-(f) do not apply to pending cases. Pet. Br. 30-31 n.15.

The government proposes that the anomaly created by applying § 1252(g) without the remainder of § 1252 be avoided by interpreting § 1252(g) to allow direct appellate review under 8 U.S.C. § 1105a. This proposal would not provide adequate review here, because as shown above, plaintiffs' claims cannot be reviewed in a court of appeals under § 1105a. But equally problematically, the government's proposal runs directly counter to the language of § 1252(g), which bars jurisdiction "[e]xcept as provided in this section," and precludes reliance on "any other provision of law." The government does not explain how a statute expressly *barring* judicial review based on "any other provision of law" can be read to *authorize* judicial review based entirely on "other provision[s] of law."³⁴

Plaintiffs offer two alternative readings that make sense of § 1252(g)'s terms and avoid unconstitutionally precluding review of their First Amendment claims.

³⁴ The government's amici founder on the same difficulty. Amicus Criminal Justice Legal Foundation acknowledges the anomaly created by applying § 1252(g) independently of the rest of § 1252, and repeats the government's proposed solution, even as it admits that it is "a bit of a stretch." Amicus Br. at 12. Amici Washington Legal Foundation, *et al.*, fail to recognize the anomaly, and base their entire brief on the demonstrably erroneous premise that all of § 1252 applies to pending deportation cases.

A. Section 1252(g) Should Be Interpreted To Apply Only To Those Pending Deportation Cases As To Which The Attorney General Invokes The New Judicial Review Procedures Set Forth In The Rest Of Section 1252

First, § 1252(g) should be construed not to apply to pending deportation cases except where the Attorney General elects to apply all of § 1252 to such cases. IIRIRA's effective date provision provides that subject only to certain "succeeding provisions," IIRIRA's amendments "shall not apply" to deportation proceedings instituted before April 1, 1997, and that "those proceedings (including judicial review thereof) shall be conducted without regard to such amendments." IIRIRA, § 309(c)(1), 8 U.S.C. § 1101 note. The "succeeding provisions" establish a limited set of "transitional changes in judicial review," but those changes do not include § 1252(g). IIRIRA, § 309(c)(4), 8 U.S.C. § 1101 note.

This reading is supported by Congress's treatment of 8 U.S.C. § 1329 (1988) in IIRIRA. Section 1329 provided district courts with jurisdiction over claims arising under the INA, and was routinely relied upon, along with 28 U.S.C. § 1331, as a jurisdictional basis for district court collateral challenges.³⁵ In IIRIRA, Congress amended § 1329 to limit its authorization to cases filed by the United States.³⁶ However, Congress specifically provided that the amendments to § 1329

³⁵ See, e.g., *Yi v. Maugans*, 24 F.3d at 506 (collecting cases); *Salehi v. INS*, 796 F.2d 1286, 1291 (10th Cir. 1986) (collecting cases); *Olaniyan*, 796 F.2d at 376; *Tooloe*, 722 F.2d at 1438..

³⁶ Prior to IIRIRA, and for all cases pending on IIRIRA's effective date, 8 U.S.C. § 1329 (1988) provides that "[t]he district courts of the United States shall have jurisdiction of all causes, civil and criminal, arising under any of the provisions of this subchapter [8 U.S.C. § 1151-1365]." For cases instituted after IIRIRA's effective date, 8 U.S.C. § 1329 (Supp. II 1996) now provides that "[n]othing in this section shall be construed as providing jurisdiction for suits against the United States or its agencies or officers."

"shall apply to actions filed after the date of enactment of this Act," IIRIRA, § 381(b), 8 U.S.C. § 1329 note (Supp. II 1996), indicating that it intended pending cases filed under that provision, such as the case under review here, to continue unaffected by IIRIRA.³⁷

The government counters that § 306(c) of IIRIRA states that § 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." But this provision is properly read not as dictating *to which cases* Section 1252(g) applies, but simply that when it applies, it will have retroactive effect as to *claims* arising from "past [and] pending" proceedings. Section 1252(g) would apply retroactively to claims arising from those cases where the Attorney General elects to invoke the new judicial review procedures for pending cases, as she is authorized to do under Sections 309(c)(2) and (3). Under § 309(c)(2), for example, the Attorney General may invoke IIRIRA in pending deportation proceedings simply by providing notice to the alien. IIRIRA, § 309(c)(2), 8 U.S.C. § 1101 note (Supp. II 1996). Section 306(c) makes clear that claims arising in those *pending* proceedings, which continue to be "deportation proceedings" but would be governed by the § 1252 "removal" rules, are subject to § 1252(g) even though it only refers to "removal orders." Under § 309(c)(3), the Attorney General may terminate deportation proceedings

³⁷ IIRIRA's legislative history also accords with this reading. IIRIRA's author, Congressman Lamar Smith, explained that "it was the clear intent of the conferees that, as a general matter, the full package of changes made by this part of title III [the judicial review amendments] effect (sic) those cases filed in court after the enactment of the new law, leaving cases already pending before the courts to continue under existing law." 142 Cong. Rec. H12293 (Oct. 4, 1996). He explained further that Congress did intend to "accelerate the implementation of certain of the reforms," and identified the accelerated reforms as those set forth in Section 309(c)(4), governing transitional changes in judicial review. *Id.* Significantly, he did not state that § 1252(g) should apply to pending cases.

in which evidentiary hearings have commenced, and reinstate new removal proceedings under IIRIRA. IIRIRA, § 309(c)(3).³⁸ In such cases, § 306(c) makes clear that any claims arising from the *past* deportation proceedings would also be subject to § 1252(g). Under this reading, § 1252(g) will apply only when the rest of § 1252, to which it refers in its opening clause, also applies.

Plaintiffs' interpretation is supported by several rules of statutory construction. First, it saves what would otherwise be an absurd and unconstitutional statute.³⁹ Second, it makes sense of § 1252(g)'s crucial "except as provided in this section" language. Third, it preserves the status quo in pending cases, consistent with the dictate that statutes should not be read to effect substantial change in the status quo unless Congress makes that intent explicit. *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991). Here, Congress went out of its way to preserve the status quo for pending cases. Finally, whatever else might be said about these provisions, they are certainly ambiguous, and as this Court has long stated, courts must "constru[e] any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. at 449.

By contrast, the government's interpretation, which would have subsection (g) apply where the rest of § 1252 does not, renders specific language in subsection (g) ("except as provided in this section") meaningless, would mark a sea-change in the structure of judicial review for pending cases only, leads to an unconstitutional and absurd result, and resolves all ambiguities *against* the alien.

³⁸ The existing injunction, however, would bar the Attorney General from doing so in this case.

³⁹ *Johnson v. Robison*, 415 U.S. at 373-74; *Central States, Southeast & Southwest Areas Pension Fund v. Lady Baltimore Foods, Inc.*, 960 F.2d 1339, 1345 (7th Cir.) (statutes should be interpreted to avoid absurd results), *cert. denied*, 506 U.S. 861 (1992).

B. In The Alternative, If Section 1252(g) Applies To Pending Cases, It Should Be Interpreted Not To Preclude Review Of Constitutional Claims

If the Court rejects the interpretation set forth above and reads § 1252(g) to apply independently to pending cases, it should interpret the provision not to encompass constitutional claims that would otherwise evade meaningful judicial review. As this Court has consistently held, jurisdictional statutes should not be interpreted to bar review of constitutional claims unless Congress provides "clear and convincing evidence" that it intended that result. *Johnson v. Robison*, 415 U.S. at 373-74. Congress must be presumed to be aware of this well-established rule of statutory construction.

Yet in enacting § 1252(g), Congress did not specify that it intended to bar judicial review of constitutional claims—in fact, the provision does not even mention constitutional claims. Therefore, even if the Court agrees with the government that § 1252(g) applies to pending cases and incorporates § 1105a, it should construe § 1252(g), as it has many other jurisdictional statutes, not to apply to constitutional claims that cannot otherwise be adequately reviewed. As established above, plaintiffs' claims cannot be adequately reviewed both because they require factfinding beyond the administrative record, and because they are suffering ongoing irreparable injuries. There is no evidence whatsoever, much less "clear and convincing evidence," that Congress intended to bar judicial review of such claims in pending cases.

When § 1252(g) is properly interpreted not to apply to plaintiffs' claims, either by construction of its effective date provision, or by construing it to exempt constitutional claims, plaintiffs' claims would be governed by the same jurisdictional statutes that governed before IIRIRA. IIRIRA, § 309(c)(1). And as established above, under that review

scheme, plaintiffs' claims are properly cognizable in district court under 8 U.S.C. § 1329 and 28 U.S.C. § 1331.⁴⁰

C. Plaintiffs' Interpretations Of Section 1252(g) As It Affects Pending Cases Are Consistent With Congress's Intent For Future Cases

Both of plaintiffs' alternative interpretations of § 1252(g) are supported by looking to the entirety of 8 U.S.C. § 1252. While the entirety of § 1252 governs only cases filed after April 1, 1997, and thus does not apply here, the fact that Congress has in § 1252 acknowledged the propriety of district court review for future cases supports the conclusion that Congress did not intend to foreclose such review for pending cases. When subsection (g) is applied in conjunction with the rest of § 1252, it creates a scheme remarkably similar to that under former § 1105a. See Pet. Br. 25 ("In significant respects, the new Section 1252 is consistent with former 8 U.S.C. § 1105a (1994)").

For future cases, Section 1252(b)(9) states that the court of appeals shall have exclusive jurisdiction over "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States," 8 U.S.C. § 1252(b)(9) (Supp. II 1996). But at the same time, Section 1252(f) authorizes individuals in future proceedings to seek injunctive relief against the operation of the removal provisions.⁴¹ These subsections can be

⁴⁰ If the Court rejects both of plaintiffs' proffered interpretations, and reads § 1252(g) to bar district court jurisdiction over plaintiffs' selective enforcement claims, then it must declare § 1252(g) unconstitutional as applied here, for the reasons set forth in Section I, *supra*.

⁴¹ 8 U.S.C. § 1252(f) (Supp. II 1996) provides:

LIMIT ON INJUNCTIVE RELIEF—

(1) IN GENERAL—Regardless of the nature of the action or claim or of the identity of the party or parties bringing the

reconciled in the same way that courts interpreted the “exclusive” review scheme under former § 1105a. Under subsection (b)(9), the court of appeals has exclusive jurisdiction over all claims—statutory or constitutional—that can be adequately addressed on appeal from a final order of removal. But where direct appellate review is inadequate, subsection (f) authorizes individuals “against whom [removal] proceedings . . . have been initiated” to seek injunctive relief.

The government argues that this reading creates a conflict between Sections 1252(f) and 1252(b)(9). Pet. Br. 17, 33. But there is no conflict, because injunctive relief authorized by subsection (f) would only be appropriate where the court of appeals under subsection (b)(9) could not provide adequate relief. It would make no sense, after all, to assign the court of appeals exclusive review over claims that it *cannot* adequately address. Just as such claims fall outside of § 1105a because it is limited to “judicial review of final orders of deportation,” *Cheng Fan Kwok*, 392 U.S. 206, so such claims would fall outside of 8 U.S.C. § 1252(b)(9), which is similarly limited to “review of an order of removal.” 8 U.S.C. § 1252(b) (Supp. II 1996). Far from “authoriz[ing] a challenge that could not have been brought before IIRIRA was enacted,” Pet. Br. 34, this interpretation merely maintains the status quo regarding collateral challenges.

The government objects that Section 1252(f) is a limit on judicial relief, not an authorization of jurisdiction. Pet. Br. 32.⁴² Plaintiffs acknowledge that the first clause of § 1252(f)

action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, [the removal provisions], *other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.*

(Emphasis added).

⁴² Subsection (f) is not itself an independent grant of jurisdiction, but under the structure of the Act, it need not be. By creating an express

limits injunctive relief in certain respects not relevant here. But the government fails to give any meaning to the last clause of § 1252(f), which expressly contemplates that individual aliens in deportation proceedings may seek injunctive relief.⁴³

Under § 1105a, it is well established that plaintiffs’ claims cannot be heard on appellate review, and that therefore district court jurisdiction is appropriate. In enacting IIRIRA, Congress gave no indication that it disapproved of the jurisprudence so construing § 1105a, and it re-enacted the very “administrative record” language that had been held to limit the scope of appellate review. By enacting § 1252(f), Congress went even further, and codified what the courts had uniformly implied in interpreting former 8 U.S.C. § 1105a—namely, a right to seek district court injunctive relief where appellate court review is inadequate. There is simply no indication that Congress intended pending cases to be treated

exception to subsection (g), it authorizes aliens to look elsewhere for jurisdiction, namely to 28 U.S.C. § 1331.

⁴³ Amici Washington Legal Foundation, *et al.*, suggest that subsection (f) authorizes only appellate courts to issue injunctions. Amici Br. at 12 n.6. But this makes no sense, because where the court of appeals on appellate review of a removal order under § 1252 lacks jurisdiction to address a particular claim because it requires factfinding beyond the administrative record, it obviously cannot provide injunctive relief on that claim; for such claims, injunctive relief can be obtained only in district court under 28 U.S.C. § 1331. Plaintiffs’ interpretation gives meaning to the government’s concession below that § 1252(f) “allows a *district court* to issue an injunction against the operation of the provisions of the 1996 Act if such injunctive relief is appropriate.” Supp. C.A. Brief for Appellants at 8 (emphasis added). Similarly, this interpretation gives meaning to the legislative history, which also indicates that Congress understood subsection (f) to authorize district court review. The House Committee Report states that because of subsection (f), “single *district courts* or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.,” but “*may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights.*” H.R. Rep. No. 469 (Pt. 1), 104th Cong., 2d Sess. 161 (1996) (emphasis added).

differently, and therefore this Court should interpret IIRIRA to preserve the district court jurisdiction that pre-existed IIRIRA.

D. Plaintiffs' Reading Of Section 1252(g) Will Create No Additional Immigration Litigation Or Delays, But Simply Maintains The Status Quo With Respect To Pending Deportation Proceedings

Finally, plaintiffs' reading accords with Congress's intent, because it creates no additional immigration litigation or delays. Under the interpretation advanced here, the only claims that are cognizable in district court are those for which appellate review of a final deportation order is inadequate. Plaintiffs' selective enforcement claims fall into two such categories of claims: claims requiring factual development beyond the scope of the immigration proceedings, and claims requiring prompt judicial intervention to avoid irreparable injury. Directing such claims to district court, as the courts consistently did under former § 1105a, creates no duplication of litigation or unnecessary delays, because by definition these claims cannot be addressed adequately (or at all) on the otherwise exclusive appellate review under § 1105a.

Resolution of this case in plaintiffs' favor therefore simply maintains the status quo for cases filed before April 1, 1997 and still subject to § 1105a review. As this Court recognized in *Cheng Fan Kwok*, this interpretation does mean that litigation related to an individual's deportation may sometimes proceed on two separate tracks. But that is largely a function of Congress's and the INS's choice to limit the scope of the deportation proceeding. 392 U.S. at 217. Subject to constitutional constraints, it is generally open to Congress or the INS to expand the scope of matters reviewable in deportation proceedings, and that would in turn contract the scope of matters that must be litigated in district court. *Id.*

The government's interpretation, by contrast, asks this Court to alter substantially the accepted judicial interpretation of § 1105a, as reflected in *Cheng Fan Kwok* and *McNary*. It does so despite the fact that Congress in enacting IIRIRA said nothing to suggest that it disapproved of district court review for claims requiring factfinding beyond the administrative record, rejected a proposal to detour those claims through the court of appeals by providing for district court transfers, and instead re-enacted the "administrative record" limitation that necessitates district court review.

CONCLUSION

For all the foregoing reasons, the Court should affirm the decision of the court of appeals.

Respectfully submitted,

David D. Cole
(Counsel of Record)
Center for Constitutional Rights
Georgetown University
Law Center
600 New Jersey Avenue N.W.
Washington, D.C. 20001
(202) 662-9078

Marc Van Der Hout
National Lawyers Guild
Van Der Hout & Brigagliano
180 Sutter Street, 5th Floor
San Francisco, California 94104
(415) 981-3000

Paul L. Hoffman
ACLU Foundation of Southern
California
1616 Beverly Boulevard
Los Angeles, California 90026
(213) 977-9500

Steven R. Shapiro
Lucas Guttentag
Lee Gelernt
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Mark T. Hansen
John Walker
Sonnenschein Nath & Rosenthal
601 S. Figueroa Street,
Suite 1500
Los Angeles, California 90017
(213) 892-5020

Dated: September 11, 1998

(14)

Supreme Court, U.S.
FILED

OCT 14 1998

OFFICE OF THE CLERK

No. 97-1252

In the Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

24 pp

TABLE OF CONTENTS

A. 8 U.S.C. 1252(g) applies to this case	1
B. 8 U.S.C. 1252(g) requires dismissal of this suit	4
C. Dismissal of this suit will not deprive respondents of a judicial forum for their claims	11
D. The Constitution does not require immediate judicial resolution of respondents' claims	17

TABLE OF AUTHORITIES

Cases:

<i>Ashwander v. TVA</i> , 297 U.S. 288 (1936)	20
<i>Auguste v. Reno</i> , 152 F.3d 1325 (11th Cir. 1998)	1
<i>Bob Jones Univ. v. United States</i> , 461 U.S. 574 (1998)	5
<i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.</i> , 511 U.S. 164 (1994)	15
<i>Cheng Fan Kwok v. INS</i> , 392 U.S. 206 (1968)	7, 8
<i>Felker v. Turpin</i> , 518 U.S. 651 (1996)	16
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	18, 19
<i>FTC v. Standard Oil Co. of California</i> , 449 U.S. 232 (1980)	8, 17
<i>Hohn v. United States</i> , 118 S. Ct. 1969 (1998)	16
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	8
<i>INS v. Lopez-Mendoza</i> , 468 U.S. 1032 (1984)	17
<i>INS v. Stanisic</i> , 395 U.S. 62 (1968)	8
<i>Kleindienst v. Mandel</i> , 408 U.S. 753 (1972)	16
<i>Lockheed Corp. v. Spink</i> , 517 U.S. 882 (1996)	5
<i>McNary v. Haitian Refugee Center, Inc.</i> , 498 U.S. 479 (1991)	10, 11
<i>Shaughnessy v. Pedreiro</i> , 349 U.S. 48 (1955)	9
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	18, 19
<i>United States v. Gonzalez</i> , 117 S. Ct. 1032 (1997)	4

II

Cases—Continued:	Page
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	17
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	9
<i>United States v. Nordic Village, Inc.</i> , 503 U.S. 30 (1992)	9
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	19, 20
Constitution, statutes and rule:	
U.S. Const. Amend. I	17, 18, 19, 20
Act of Oct. 11, 1996, Pub. L. No. 104-302, 110 Stat. 3656:	
§ 2(1), 110 Stat. 3657	2
§ 2(2), 110 Stat. 3657	2
Administrative Procedure Act, 5 U.S.C. 551 <i>et seq.</i> :	
5 U.S.C. 704	8
5 U.S.C. 1009(c) (1964)	9
Hobbs Administrative Orders Review Act, 28 U.S.C. 2341 <i>et seq.</i> :	
28 U.S.C. 2347(b)	13
28 U.S.C. 2347(b)(2)	16
28 U.S.C. 2347(b)(3)	12, 13, 14, 15, 16, 17
28 U.S.C. 2347(c)	14, 15
28 U.S.C. 2349	4
Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, Div., 110 Stat. 3009-546:	
§ 306(a)(2), 110 Stat. 3009-607:	
8 U.S.C. 1252 (Supp. II 1996)	1, 2, 3, 4, 5
8 U.S.C. 1252 note (Supp. II 1996)	2
8 U.S.C. 1252(a) (Supp. II. 1996)	5, 6
8 U.S.C. 1252(b) (Supp. II 1996)	5, 6
8 U.S.C. 1252(b)(4)(A) (Supp. II 1996)	13
8 U.S.C. 1252(b)(9) (Supp. II 1996)	3, 4, 15, 16
8 U.S.C. 1252(f) (Supp. II 1996)	4, 16
8 U.S.C. 1252(f)(1) (Supp. II 1996)	4
8 U.S.C. 1252(g) (Supp. II 1996)	<i>passim</i>
§ 306(c)(1), 110 Stat. 3009-612	2, 6

III

Statutes and rule—Continued:	Page
§ 309(c)(1)(B), 110 Stat. 3009-625	5
§ 309(c)(2), 110 Stat. 3009-626	2
§ 309(c)(3), 110 Stat. 3009-626	2
§ 381(a), 110 Stat. 3009-650:	
8 U.S.C. 1329 (Supp. II 1996)	2, 9
Immigration and Nationality Act, 8 U.S.C. 1101 <i>et seq.</i> :	
8 U.S.C. 1101 note (Supp. II 1996)	2, 5
8 U.S.C. 1105a(1964)	9
8 U.S.C. 1105a (1994)	5, 6, 8, 10
8 U.S.C. 1105a(a)(4) (1964)	9, 13
8 U.S.C. 1105a(a)(4) (1994)	13
8 U.S.C. 1105a(c) (1964)	2
8 U.S.C. 1231	4
8 U.S.C. 1252(b) (1994)	8
8 U.S.C. 1329	2, 3, 9
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359	10, 11
28 U.S.C. 1331	9
Fed. R. App. P. 48	13
Miscellaneous:	
142 Cong. Rec.:	
pp. S4595-S4596 (daily ed. May 2, 1996)	15
p. S4740 (daily ed. May 6, 1996)	15
H.R. 2202, 104th Cong., 2d Sess. (1996)	15
H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. (1996)	2
H.R. Rep. No. 2122, 81st Cong., 2d Sess. (1950)	14
H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. 1 (1996)	4
S. Rep. No. 2618, 81st Cong., 2d Sess. (1950)	14

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1252

JANET RENO, ATTORNEY GENERAL, ET AL.,
PETITIONERS

v.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE,
ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

A. 8 U.S.C. 1252(g) Applies To This Case

New 8 U.S.C. 1252(g) (Supp. II 1996), as added by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), is entitled "Exclusive jurisdiction" and states:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien.

Respondents contend that Section 1252(g) does not apply to this case because (1) they were placed in deportation proceedings before IIRIRA's effective date, and (2) they present a constitutional claim. Those arguments lack merit.

1. Respondents' contention that Section 1252(g) does not apply to cases pending when IIRIRA was enacted is contrary to the holding of every court of appeals that has considered the question, including the Ninth Circuit in this case. See Gov't Br. 30; *Auguste v. Reno*, 152 F.3d 1325, 1328-1329

(11th Cir. 1998). In arguing that Section 1252(g) does not apply, respondents rely (Br. 39-41) on Section 309(c)(2) and (3) of IIRIRA. That provision authorizes the Attorney General to determine, with respect to a particular deportation proceeding that was pending on the Act's effective date, that *all* of the provisions of Section 1252 will apply. See 110 Stat. 3009-626 (as amended by Pub. L. No. 104-302, § 2(2), 110 Stat. 3657); 8 U.S.C. 1101 note (Supp. II 1996). Respondents contend that Section 1252(g) should not apply to cases pending on the Act's effective date except where the Attorney General invokes Section 309(c)(2) and (3).

Respondents' argument is contrary to the unambiguous directive in Section 306(c)(1) of IIRIRA, which states that Section 1252(g) "shall apply *without limitation* to claims arising from *all* past, pending, or future exclusion, deportation, or removal proceedings under" the Immigration and Nationality Act (INA). 110 Stat. 3009-612 (as amended by Pub. L. No. 104-302, § 2(1), 110 Stat. 3657) (emphasis added); 8 U.S.C. 1252 note (Supp. II 1996); see Gov't Br. 29. Nothing in the text of IIRIRA suggests that the applicability of Section 1252(g) is contingent upon the Attorney General's decision to invoke other provisions of the Act with respect to a particular deportation or exclusion proceeding. To the contrary, the italicized language forecloses respondents' contention that the application of new Section 1252(g) is limited to a subset of pending cases. See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 221 (1996) ("The jurisdictional bar in new section [1252](g) shall apply without limitation to all past, pending, or future exclusion, deportation, or removal proceedings under the INA.").¹

¹ Contrary to respondents' suggestion (Br. 39-40), there is no logical inconsistency between Congress's decision that the IIRIRA amendment to 8 U.S.C. 1329 should not apply to pending cases (see Gov't Br. 5 n.2), and its unambiguous determination that the new Section 1252(g) should apply. Before IIRIRA, Section 1329 potentially covered a broad range of suits against the government that do not involve removal proceedings.

In addition, respondents' reading of the effective date provision would not obviate the need for eventual judicial resolution of the reviewability issue posed by this case. With respect to deportation proceedings commenced after IIRIRA's effective date, Section 1252(g) unambiguously precludes reliance on any statutory review provision outside Section 1252 itself. As to such cases, moreover, new Section 1252(b)(9) provides:

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section.

8 U.S.C. 1252(b)(9) (Supp. II 1996).

Those provisions confirm that a selective-enforcement challenge to any post-IIRIRA deportation charges can be entertained by a court only after entry of a final order of deportation. Respondents contend that the INA should be construed to allow their claim to proceed outside the statutory framework in order to avoid allegedly irreparable injury. For the reasons stated below (at 17-20) and in our opening brief (at 40-44), that rationale lacks merit. But even if it were to be given some credence, the eventual need for judicial resolution of the issue cannot be avoided by holding that Section 1252(g) is inapplicable to pending cases.

2. Respondents also contend (Br. 42) that Section 1252(g) should be declared inapplicable either to "constitutional claims" generally, or to "constitutional claims that would otherwise evade meaningful judicial review." As we explain below (at 12-17), the instant suit does not fall into the latter category. In any event, respondents' proposed limitations

Although Congress declined to divest the district courts of jurisdiction over all such pending cases, it chose to give immediate effect to a provision aimed at minimizing judicial disruption of the removal process.

have no basis in the text of Section 1252(g). That Section applies to "any cause or claim by or on behalf of any alien" arising from the commencement or conduct of removal proceedings. Compare *United States v. Gonzalez*, 117 S. Ct. 1032, 1035 (1997). Congress's intent to defer review of constitutional claims until the entry of a final order of deportation is made particularly clear by new Section 1252(b)(9), which requires that result for "all questions of law and fact, including interpretation and application of constitutional and statutory provisions." See p. 3, *supra*.²

B. 8 U.S.C. 1252(g) Requires Dismissal Of This Suit

1. New Section 1252(g) does not itself define the procedures to be utilized in reviewing deportation proceedings or orders. Rather, Section 1252(g) is an exclusivity-of-review provision. With respect to deportation cases commenced after the effective date of IIRIRA, application of Section 1252(g) is straightforward. It states that review of the deportation process is unavailable "[e]xcept as provided in

² Respondents thus can draw no support from "the entirety of 8 U.S.C. § 1252." Resp. Br. 43. Contrary to respondents' contention (*id.* at 43), new 8 U.S.C. 1252(f) (Supp. II 1996) does not "authorize[] individuals in future proceedings to seek injunctive relief against the operation of the removal provisions." Rather, Section 1252(f) is by its terms a *restriction* on the remedial authority of a reviewing court. See Gov't Br. 32. The final phrase of Section 1252(f)(1), which states that the bar to injunctive relief does not apply "with respect to the application of [8 U.S.C. 1221-1231] to an individual alien against whom proceedings under such part have been initiated," is simply an exception to the general prohibition, not an affirmative grant of authority. See Pet. App. 249a (O'Scannlain, J., dissenting from denial of rehearing en banc). It preserves the power of the court of appeals, on petition for review under the Hobbs Act, to "enjoin" enforcement of a final deportation order. See 28 U.S.C. 2349. Contrary to respondents' suggestion (Br. 45 n.43), the House Report on IIRIRA does not state that *district* courts may issue injunctive relief pertaining to individual aliens; it states that "courts" may do so, see H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 161 (1996), meaning the courts of appeals on petition for review under the Hobbs Act.

this section" (emphasis added). The italicized language refers to 8 U.S.C. 1252(a) and (b) (Supp. II 1996), the provisions of new Section 1252 that authorize judicial review only in the courts of appeals and only after the entry of a final order of removal. See Gov't Br. 30 n.15.

With respect to aliens placed in deportation proceedings before IIRIRA's effective date, judicial review of any final deportation order continues to be governed by former 8 U.S.C. 1105a (1994). That result is compelled by IIRIRA § 309(c)(1)(B), which specifically addresses the application of IIRIRA to aliens placed in deportation proceedings before the Act's effective date and provides, with limited exceptions not relevant here, that "the proceedings (including judicial review thereof) shall continue to be conducted without regard to [the] amendments" made by IIRIRA. 110 Stat. 3009-625; 8 U.S.C. 1101 note (Supp. II 1996); see Gov't Br. 31 n.15. In such cases, the phrase "in this section" in Section 1252(g) can be given effect only by construing it to mean 8 U.S.C. 1105a (1994), which provides for judicial review of deportation orders in cases commenced before April 1, 1997, in the same manner "as provided in" Section 1252(g)—*i.e.*, pursuant to the Hobbs Act. Thus, the approach we advocate is rooted in the text of IIRIRA as a whole, and in the principle that "[w]hen Congress includes a provision that specifically addresses the temporal effect of a statute, that provision trumps any general inferences that might be drawn from the substantive provisions of the statute." *Lockheed Corp. v. Spink*, 517 U.S. 882, 897 (1996); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983) ("in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute * * * and the objects and policy of the law").

Thus, judicial review of any final orders of deportation that are ultimately entered in respondents' cases will be governed by former 8 U.S.C. 1105a (1994)—the judicial review

provision that was the pre-IIRIRA analogue to new Section 1252(a) and (b). Contrary to respondents' suggestion (see Br. 38), that approach does not render Section 1252(g) irrelevant to this case. As we note above (see pp. 4-5 *supra*), the purpose of Section 1252(g) is not to establish procedures for judicial review of deportation decisions. Rather, Section 1252(g) serves to make absolutely clear that the INA review provisions are exclusive, and that review of the deportation process cannot be obtained under some more general provision. By providing that Section 1252(g) applies "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings" (IIRIRA § 306(c)(1), as amended), Congress made clear that IIRIRA's express confirmation of the rule of exclusivity is immediately applicable to aliens such as respondents. Immediate application of that exclusivity principle is in no way inconsistent with Congress's determination that judicial review under the INA of any final order of deportation in respondents' cases will be governed by former Section 1105a rather than by new Section 1252(a) and (b).

2. Respondents contend that under pre-IIRIRA law, claims requiring factfinding beyond the administrative record could not be reviewed on appeal of a deportation order, and therefore were appropriately heard in a suit filed in district court.³ Respondents then argue that the pre-IIRIRA

³ Respondents assert (Br. 1): "The government agreed at the outset that selective enforcement claims could be heard only in an original district court action." In fact, the government filing on which respondents rely (Resp. Br. 1 n.2), at the very page they cite, stated (as a subject heading) that "The Court Lacks Jurisdiction to Address the Selective Enforcement Claim at This Time." Defendants' Memorandum in Response to the Court's Order of May 4, 1989, Concerning its Jurisdiction over Plaintiffs' Selective Prosecution Claim and the Effect of Declaratory Relief at 3 (filed May 25, 1989). The government argued (see *id.* at 3-8) that immediate adjudication of respondents' selective enforcement claim was inappropriate because it would disrupt the administrative process estab-

rules continue to authorize their suit. See Resp. Br. 21 & n.16. Those arguments lack merit, both because respondents misstate the jurisdictional rules that applied before IIRIRA was enacted, and because Section 1252(g) would divest the district court of jurisdiction of this case even if it had been properly brought in the first instance.

a. Respondents cite no case holding that the filing of deportation charges, or any other interlocutory step within the deportation process itself, could be subject to review in district court. Rather, the pre-IIRIRA cases they cite simply make clear that claims arising outside the deportation process fell outside the scope of former Section 1105a even if they were filed by a potentially deportable alien and could affect the alien's right to remain in the country. Contrary to respondents' contention, none of this Court's decisions has suggested that the applicability of former Section 1105a turned on whether factfinding was required. Rather, the Court has focused on whether the particular claims were properly regarded as challenges to an order of deportation.

Thus, in *Cheng Fan Kwok v. INS*, 392 U.S. 206, 216 (1968), the Court "h[e]ld that the judicial review provisions of [former Section 1105a] embrace only those determinations made during a proceeding conducted under [former 8 U.S.C. 1252(b) (1994)], including those determinations made incident to a motion to reopen such proceedings." The Court concluded that review of a district director's denial of a stay

lished by Congress. The government also suggested the possibility that "the court of appeals may remand the case to the district court for an evidentiary hearing" in the event that an alien is able to make a *prima facie* showing of selective enforcement after exhaustion of administrative remedies. *Id.* at 4. The government's statement (*id.* at 3) that "to the extent that it is appropriate for any court to entertain a selective enforcement challenge to the issuance of an Order to Show Cause, jurisdiction is in the district court," appears to have been nothing more than a recognition that no *other* court could plausibly be thought to have jurisdiction prior to the completion of administrative proceedings.

of deportation was not governed by Section 1105a. See 392 U.S. at 212-217. The Court observed, *inter alia*, that the denial of a stay “was issued more than three months after the entry of the final order of deportation, in proceedings entirely distinct from” the deportation proceeding. *Id.* at 212-213 (footnote and internal quotation marks omitted); accord *INS v. Stanisic*, 395 U.S. 62, 68 n.6 (1969); *INS v. Chadha*, 462 U.S. 919, 938-939 (1983).⁴ Nothing in *Cheng Fan Kwok* or its progeny in this Court supports the unlikely proposition that the filing of deportation charges in the immigration court is “entirely distinct” from the deportation proceedings themselves.

b. As we explain in our opening brief (at 23-24 & nn. 9-11), the reason that the filing of deportation charges was unreviewable under the pre-IIRIRA regime was not simply that former Section 1105a precluded such review. There was, in addition, no statutory provision affirmatively authorizing it. No provision of the INA, either before or after IIRIRA, suggests that the filing of deportation charges is subject to immediate judicial review. The Administrative Procedure Act (APA) furnishes the mechanism for judicial review of federal agency action in the absence of more specific statutory review provisions. Review under the APA, however, is confined to “final agency action.” See 5 U.S.C. 704. Respondents do not contend that the filing of administrative charges is “final agency action” within the meaning of the APA, and this Court’s decision in *FTC v. Standard Oil Co. of California*, 449 U.S. 232, 239-245 (1980), makes clear that it is not. See Gov’t Br. 23-24 & nn. 9-10. Indeed, neither respondents’ complaint nor their brief in this Court makes any attempt to identify a statutory provision that affirma-

⁴ The court of appeals decisions cited by respondents (Br. 22 & nn. 17-18) likewise concerned almost exclusively decisions made by a district director that were entirely distinct from the deportation proceedings.

tively authorizes their suit or waives the sovereign immunity of the federal government.⁵

c. Finally, even if respondents’ district court challenge to the filing of deportation charges had been properly brought

⁵ Both in their complaint and in their brief in this Court, respondents have identified 8 U.S.C. 1329 and 28 U.S.C. 1331 as jurisdictional bases for their suit. See Resp. Br. 2, 42-43; J.A. 22. Respondents’ apparent premise is that the existence of a general jurisdictional statute provides a sufficient basis for suing the federal government unless some other statutory provision specifically precludes the suit. That is not the law. Rather, “[t]he United States, as sovereign, is immune from suit save as it consents to be sued.” *United States v. Mitchell*, 445 U.S. 535, 538 (1980). And “[w]aivers of the Government’s sovereign immunity, to be effective, must be unequivocally expressed.” *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992) (internal quotation marks omitted).

Awareness of the APA’s “final agency action” requirement is crucial to understanding the development of the INA’s review procedures. Before the 1961 amendments to the INA, review of a final order of deportation was available in district court under the APA. See *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955); Gov’t Br. 21 n.7. The 1961 amendments altered that regime by making review in the court of appeals pursuant to the Hobbs Act “the sole and exclusive procedure for[] the judicial review of all final orders of deportation.” 8 U.S.C. 1105a (1964); Gov’t Br. 21 n.7. As amended in 1961, the INA did not in terms declare that non-final agency actions (such as the filing of charges) within the deportation process were immune from immediate judicial review. Such a provision was unnecessary, however, because Section 1105a(c) (1964) required exhaustion of administrative remedies and because non-final actions would not have been subject to APA review to begin with. See 5 U.S.C. 1009(c) (1964) (“Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.”).

Section 1252(g) now explicitly confirms what was evident in any event from the text and structure of Section 1105a and the APA. Section 1252(g) states that the review provisions of the INA are exclusive not only with respect to the final order of deportation itself, but also with respect to “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under” the INA.

under pre-IIRIRA law, the suit clearly was not brought under Section 1105a itself. Section 1105a provided for review only of final orders of deportation, required exhaustion of administrative remedies, and established exclusive jurisdiction in the courts of appeals. For that reason, if the district court had jurisdiction to hear this suit at all, it could only have been under some other grant of authority. New Section 1252(g), however, precludes reliance on any more general statutory review provision when, as here, the plaintiff's claim "aris[es] from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien." 8 U.S.C. 1252(g) (Supp. II 1996). Section 1252(g) thus requires dismissal of respondents' suit, regardless of whether that suit was properly brought under pre-IIRIRA law when it was first filed.

3. Respondents' reliance (Br. 22-23) on *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991), is misplaced. *McNary* did not involve a challenge to the filing of deportation charges, or to any other interlocutory action within the deportation process. Rather, it involved a class-action challenge to entirely separate administrative procedures used by the INS in adjudicating applications for special agricultural worker (SAW) status under the Immigration Reform and Control Act of 1986 (Reform Act). The Court began its analysis by identifying "matters that are not in issue." *Id.* at 490. It stated, *inter alia*, that "[the government's] argument assumes that the District Court would have federal-question jurisdiction over the entire case if Congress had not" included a preclusion-of-review provision in the Reform Act. *Id.* at 491.⁶ The Court held that that preclusion provision—

⁶ The denial of an application for SAW status would surely have been "final agency action" subject to review under the APA if review had not been precluded by the Reform Act. See *McNary*, 498 U.S. at 490-491 (describing benefits that SAW status entails and hardships that denial imposes).

which generally barred a district court challenge to "a determination respecting an application for adjustment of status" (see *id.* at 486 n.6)—did not divest the district court of authority to adjudicate a systemic challenge to INS policies regarding the SAW program. See *id.* at 490-494.

The instant case is distinguishable from *McNary* in two fundamental respects. First, although the Court in *McNary* observed that adjudication of the plaintiffs' claims would require considerable factual development, see 498 U.S. at 493, 497, it did not suggest that the need for factfinding could justify disregard of clear statutory limits on district court jurisdiction. Rather, it examined the language of the preclusion-of-review provision and concluded that the provision was inapplicable, by its terms, to the plaintiffs' suit. See *id.* at 491-494. It noted, in that regard, that Congress "could easily have used broader statutory language" if it had intended to foreclose review of the plaintiffs' systemic challenge. See *id.* at 494. Section 1252(g), by contrast, applies unambiguously to respondents' challenge to the filing of deportation charges.

Second, the starting point for the *McNary* Court's analysis—the Court's assumption that judicial review would have been available if not for the Reform Act's preclusion provision—is inapplicable to this case. As we explain above (at 8-9) and in our opening brief (at 23-24 & nn. 9-11), no statutory provision affirmatively authorizes judicial review of the filing of administrative charges, either generally or in deportation proceedings. Thus, quite apart from Section 1252(g)'s preclusion of review, nothing in *McNary* suggests that the agency action challenged by respondents is the sort of (final) action that is reviewable to begin with.

C. Dismissal Of This Suit Will Not Deprive Respondents Of A Judicial Forum For Their Claims

As we explain in our opening brief (at 44-49), the Hobbs Act would permit a court of appeals reviewing a final order of deportation to transfer the case to a district court if

adjudication of a selective enforcement claim required resolution of factual issues. See 28 U.S.C. 2347(b)(3). Respondents' brief repeatedly invokes the principle that statutes should be construed, if reasonably possible, to facilitate review of constitutional challenges to federal agency action. References to that principle are notably absent, however, from respondents' discussion of Section 2347(b)(3). Rather, the basic structure of respondents' argument is that (1) judicial review of their selective enforcement claims must be available either now or after the entry of a final deportation order; (2) Section 2347(b)(3), construed parsimoniously, will not permit a transfer to district court for development of an adequate factual record; and (3) the INS's decision to file deportation charges must therefore be subject to immediate district court review. That approach is seriously flawed.

1. Respondents assert: "The government concedes that [respondents'] claims must be subject to judicial review." Resp. Br. 14; see also *id.* at 18. That is a misstatement of the government's position. Our opening brief acknowledges that, under this Court's precedents, denial of all judicial review of a colorable constitutional claim would raise a serious constitutional question. Gov't Br. 36-37. We also believe that Section 2347(b)(3) on its face permits transfer to a district court, in an appropriate case, for resolution of a substantial selective enforcement challenge to a final order of deportation. It is far from clear, however, that the Constitution actually *requires* Congress to provide a judicial forum for a selective enforcement claim in the deportation context, if neither the substantive ground of deportation nor the administrative hearing is tainted by any constitutional violation.

That question need not, however, be resolved at the present time. If respondents are ultimately subjected to final orders of deportation, and thereafter seek to pursue their selective enforcement claims, the reviewing court of appeals will be required to determine whether Section 2347(b)(3) (or

some other provision for resolving material factual issues, see, *e.g.*, Fed. R. App. P. 48 (special masters)) may appropriately be invoked. If the court concludes that no mechanism for resolving those claims is available, it will then be obliged to decide whether respondents are constitutionally entitled to adjudication of their selective enforcement challenge. If the court finds that such an entitlement exists, it will fashion an appropriate mechanism—most likely a procedure similar to a Section 2347(b)(3) transfer. Thus, even assuming that respondents are constitutionally entitled to judicial review of their selective enforcement claims, dismissal of this suit cannot possibly deprive them of that right.

2. Both before and after enactment of IIRIRA, the INA has provided that a court of appeals in reviewing a final order of deportation shall decide the case based solely on the administrative record compiled during the agency proceedings. 8 U.S.C. 1252(b)(4)(A) (Supp. II 1996); 8 U.S.C. 1105a(a)(4) (1994). Respondents read that requirement as precluding a transfer to district court pursuant to 28 U.S.C. 2347(b)(3). See Resp. Br. 24-25. As we explain in our opening brief (at 47 n.22), however, the requirement that review be based upon the administrative record does not prescribe a special rule for immigration cases, but simply restates a generally applicable rule of administrative law. The evident purpose of limiting the court of appeals' review to the administrative record, moreover, is to ensure that the agency has the initial opportunity to consider any evidence bearing on the appropriate disposition of the case. That purpose is hardly served by respondents' proposed approach, which would permit judicial review of the initial charging decision before completion of the administrative proceedings.

Respondents also observe (Br. 27-28) that transfer under the Hobbs Act is available only when "the agency has not held a hearing before taking the action of which review is sought" (28 U.S.C. 2347(b)) and "a hearing is not required by law" (28 U.S.C. 2347(b)(3)). Because the INS is required to

conduct a hearing before issuing a final order of deportation, respondents contend that a Section 2347(b)(3) transfer is unavailable when a court of appeals reviews such an order. The INS is not, however, required to hold a hearing before the filing of deportation charges—the action that respondents claim was taken in violation of their constitutional rights—and no such hearing was held in this case. If respondents are ultimately subjected to final orders of deportation and seek to pursue their selective enforcement claims, the charging decision itself would properly be regarded as “the action of which review is sought,” thus making transfer under Section 2347(b)(3) available. That result would fulfill the purpose of the Hobbs Act of ensuring the availability of an adequate mechanism for taking evidence within the framework of that Act itself. See S. Rep. No. 2618, 81st Cong., 2d Sess. 4 (1950) (“The bill has adequate provisions in section 7(b) and (c) [28 U.S.C. 2347(b) and (c)] for the taking of evidence either by the agency or in the district court, when for one reason or another that is necessary because a suitable hearing was not held prior to initiation of the proceeding in the court of appeals.”); accord H.R. Rep. No. 2122, 81st Cong., 2d Sess. 4 (1950). As we have explained (Gov’t Br. 46 & n.21), Congress, in enacting IIRIRA, foreclosed one mechanism in the Hobbs Act for taking additional evidence (a remand to the agency pursuant to 28 U.S.C. 2347(c)), since new evidence can be presented on a motion to reopen the order of deportation, but it left in place for removal cases the Hobbs Act’s provision for transfer to the district court pursuant to 28 U.S.C. 2347(b)(3) where there is no opportunity for a hearing on the issue before the BIA.⁷

⁷ Respondents rely (Br. 26) on the fact that the Senate version of the IIRIRA bill would have specifically provided for transfer to the district court if the court of appeals finds that a petition for review raises a constitutional question that presents a genuine issue of material fact. That provision was added on the Senate floor, without debate, as part of an

Respondents contend that the approach we advocate would complicate the adjudication of petitions for review in immigration cases. See Resp. Br. 28 (“On the government’s view, * * * deciding whether to transfer a matter under § 2347(b)(3) would become a routine part of appellate courts’ work in immigration cases.”). That concern is without basis. In the first place, as our opening brief explains (at 48), transfer under Section 2347(b)(3) is appropriate only in the rare case where the issue cannot be resolved by the court of appeals on the basis of the pleadings and affidavits (see 28 U.S.C. 2347(b)(2)), and the facts necessary to resolve it were not and could not have been adequately developed in the course of the administrative proceedings. Furthermore, contrary to respondents’ assertion (Br. 29), the Hobbs Act’s assignment of a “gatekeeping” role to the court of appeals before a fact-based collateral challenge to a final deportation order is instituted in the district court substantially furthers

amendment that also contained the substance of what was ultimately enacted as 8 U.S.C. 1252(b)(9) (Supp. II 1996), which provides that judicial review of all issues involving interpretation or application of constitutional provisions is available only on review of a final order of removal. See 142 Cong. Rec. S4595-S4596 (daily ed. May 2, 1996); see also *id.* at S4740 (daily ed. May 6, 1996) (H.R. 2202, § 142(a), as it passed the Senate). The provision for transfer to the district court where a constitutional issue is presented was omitted by the Conference Committee, again without explanation. The most likely reason, however, is that the Hobbs Act, in 28 U.S.C. 2347(b)(3), already provided for transfer of such cases, see, e.g., *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994)—perhaps coupled with a reluctance on the part of a Congress intent on expediting the removal process to lend any credence to fact-based constitutional claims such as those presented here. It is, in any event, implausible to suggest that by deleting the provision, Congress intended to permit review of constitutional claims outside the self-contained framework of the Hobbs Act, since Congress retained the portion of the same amendment that requires *all* constitutional claims to be raised in the court of appeals on review of a final order of deportation, so as to ensure consolidation and expedition of all judicial review.

the statutory goal of the INA and IIRIRA of consolidating all challenges to removal proceedings in the courts of appeals and expediting completion of those proceedings. Compare *Felker v. Turpin*, 518 U.S. 651, 656-657 (1996); *Hohn v. United States*, 118 S. Ct. 1969, 1972 (1998).⁸

3. Our reading of Section 2347(b)(3) is far more consistent with the text of the relevant statutes, and with the manifest intent of Congress to consolidate and expedite all judicial review in the court of appeals, than the approach espoused by respondents. The government's interpretation of Section 2347(b)(3)—unlike respondents' construction of Section 1252(g) (as well as Section 1252(b)(9) and (f) and IIRIRA's effective date provisions)—is fully consistent with the text of both the INA and the Hobbs Act. Our approach also effectuates IIRIRA's overarching directive that a judicial challenge to the deportation process must await the entry of a final order—a directive that is itself consistent with background principles of administrative law.

For the foregoing reasons, a Section 2347(b)(3) transfer would be available if, on review of any final orders of deportation that may be entered against respondents, a reviewing court were to find that they made a substantial showing of unconstitutional selective enforcement—and that such a claim could render a deportation order invalid, notwithstand-

⁸ Contrary to respondents' assertion (Br. 14, 18), we do not concede that respondents' claims require factual development of the sort that would necessitate transfer to the district court pursuant to 28 U.S.C. 2347(b)(3) even if we assume *arguendo*, that a selective enforcement challenge is viable in this setting. An affidavit by the responsible INS official that respondents' fundraising on behalf of the PFLP led to the referral to the INS and the institution of charges would furnish a "facially legitimate and bona fide reason" for INS's actions (see *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972); Pet. 20-30), and a fully sufficient basis for the court of appeals to dispose of the claim. See also Pet. 28-29 (discussing this Court's cases permitting deportation of aliens who have engaged in meaningful activities with foreign-dominated subversive groups).

ing the continuing nature of the INA violation and the compelling countervailing interests at stake. Compare *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1046-1050 (1984). This Court need not resolve those issues, however, in order to determine that the instant suit must be dismissed. IIRIRA unambiguously precludes the district court from exercising jurisdiction over respondents' current claims. The Court may order the suit dismissed on that basis, leaving for another day the question how, if at all, their selective enforcement claims should be reviewed in the event that some or all of the respondents are ultimately subjected to a final order of deportation. See pp. 12-13, *supra*.

D. The Constitution Does Not Require Immediate Judicial Resolution of Respondents' Claims

Respondents contend that review of their selective enforcement claims after entry of a final order of deportation "is patently inadequate, because it would leave them with no judicial recourse for their irreparable First Amendment injuries" during the pendency of the administrative proceedings. Resp. Br. 30. They further assert that "[f]ew principles are more basic to First Amendment jurisprudence than the notion that First Amendment claims require prompt judicial review." *Id.* at 31. None of the cases they cite, however, suggests that an Act of Congress is unconstitutional if it defers constitutional challenges to federal agency action until the completion of administrative proceedings.

1. Even where a defendant contends that a criminal prosecution was brought against him for a constitutionally impermissible reason, "reversal of the conviction and * * * the provision of a new trial free of prejudicial error normally are adequate means of vindicating the constitutional rights of the accused." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268 (1982). See also, *e.g.*, *Standard Oil*, 449 U.S. at 244 (obligation to participate in administrative adjudication is not irreparable injury). Respondents identify no

current constraints on their freedom of action beyond those associated with the deportation process itself. Their claim instead is that they are presently "chilled" (Resp. Br. 36) from engaging in PFLP-related activities, and that a favorable judicial ruling will eliminate the chill. Congress is not obligated, however, to provide a plaintiff with immediate access to a federal judicial forum whenever the plaintiff alleges that uncertainty as to the scope of his First Amendment rights discourages him from engaging in expressive or associational activities.⁹

2. The Constitution has been held to require prompt access to a judicial forum when an individual's right to engage in expressive activity is conditioned on the prior approval of a government official. See Resp. Br. 31 & n.27 (citing *Freedman v. Maryland*, 380 U.S. 51 (1965) and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)). Respondents acknowledge (Br. 31 n.27) that no prior restraint is involved in this case. They contend, however, that selective enforcement based on the exercise of First Amendment rights "has many of the same effects and should raise the same concerns as do prior restraints." *Ibid.* That argument stands this

⁹ Some of respondents' assertions regarding the chilling effect of the pending deportation proceedings are incredible on their face. Respondents state that they have "bec[o]me afraid to engage in even the most basic political activities, including reading magazines, discussing political issues publicly, and supporting the peace process in the West Bank." Resp. Br. 7. Nothing in the record suggests that the INS has taken adverse action against respondents, or anyone else, based on such activities. Moreover, the selective enforcement of which respondents complain can "chill" their continued participation in fundraising and other PFLP activities only if respondents (1) intend to commit future violations of the immigration laws but believe that the INS will forgo the filing of charges so long as they refrain from associating with the PFLP, or (2) anticipate that the charges based on their past violations will be dropped if they discontinue their activities. The first assertion obviously would provide no basis for immediate judicial review. Respondents have not alleged that the second proposition is true, and nothing in the record supports it.

Court's prior restraint jurisprudence on its head. The guiding premise of that jurisprudence is that a requirement of prior official approval for communicative activities poses special dangers to First Amendment rights and accordingly should be subject to special constraints. See *Freedman*, 380 U.S. at 57-58; *Southeastern Promotions*, 420 U.S. at 552-562. Respondents may not invoke the extraordinary procedural safeguards applicable to prior restraints by arguing that there is nothing special about prior restraints after all.

3. Recognition of a First Amendment right to immediate judicial review in this setting would have far-reaching implications. Such a right could not plausibly be confined to the context of immigration, but would presumably override statutory exhaustion and finality requirements, no matter how unambiguous, in all administrative settings.¹⁰ Nor could such a right be limited to claims of selective enforcement. Because administrative officials ordinarily lack authority to resolve constitutional challenges to their governing statutes, see *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975), recognition of a right to immediate review in the present case would imply a similar right where the statute under which an administrative action is taken is alleged to "chill" activities that are protected by the First Amendment.¹¹

¹⁰ As we explain in our opening brief (at 39-40), this Court has shown particular deference to Congress's decisions regarding the terms on which aliens will be permitted to enter and remain in the country. IIRIRA reflects Congress's determination that judicial review of the deportation process must await completion of administrative proceedings. If First Amendment claims are constitutionally exempted from that requirement even in the deportation context, it is difficult to see how exhaustion principles could be applied to such claims in any administrative setting.

¹¹ At an early stage of this case, the district court held that respondents Hamide and Shehadeh could not obtain immediate judicial review of their First Amendment challenge to the substantive INA provisions under which they were alleged to be deportable. The court explained that Hamide and Shehadeh were required to exhaust their administrative

4. It is a fundamental principle of federal adjudication that courts should not resolve constitutional questions in advance of the necessity of doing so. See, *e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring). Administrative exhaustion principles serve in part to prevent the courts from prematurely deciding constitutional issues whose resolution might ultimately prove unnecessary. See *Salfi*, 422 U.S. at 762. In the instant case, however, the court of appeals issued a constitutional ruling with potentially sweeping implications for national security and foreign policy (see Pet. 20-29) before the responsible Executive Branch officials had even determined whether respondents were deportable. The Constitution does not require such a departure from *Ashwander* principles simply because respondents' claims arise under the First Amendment.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions that the complaint be dismissed for lack of jurisdiction.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

OCTOBER 1998

remedies, and that review of their constitutional claim would be available in the court of appeals if and when they were subject to a final deportation order. Pet. App. 194a-195a. Respondents Hamide and Shehadeh did not appeal that ruling. *Id.* at 171a. If the First Amendment entitles respondents to immediate judicial review of their selective enforcement claims, however, it is not clear why the same rationale would not give rise to a right of immediate review of the contention that the statutory provisions governing their deportability are themselves unconstitutional.

6
No. 97-1252

FILED

JUL 16 1998

**IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997**

OFFICE OF THE CLERK
SUPREME COURT

JANET RENO, Attorney General, *et al.*,
Petitioners,

v.

**AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, *et al.*,**
Respondents.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**BRIEF OF WASHINGTON LEGAL FOUNDATION,
ALLIED EDUCATIONAL FOUNDATION, THE
JEWISH INSTITUTE FOR NATIONAL SECURITY
AFFAIRS, THE JEWISH POLICY CENTER, AND
REP. GERALD SOLOMON AS
AMICI CURIAE IN SUPPORT OF PETITIONERS**

**DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302**

Date: July 16, 1998

34 pp

QUESTION PRESENTED

Whether the courts below had jurisdiction to entertain, prior to the entry of a final order of deportation, a challenge to deportation proceedings initiated against Respondents, where Respondents contend that continuation of those proceedings will chill their First Amendment rights.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTERESTS OF THE <i>AMICI CURIAE</i>	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. IIRIRA DIVESTS FEDERAL COURTS OF ALL JURISDICTION TO HEAR CHALLENGES TO ON-GOING DEPORTATION PROCEEDINGS .	10
II. RESPONDENTS WILL BE ABLE TO DEVELOP AN ADEQUATE FACTUAL RECORD SHOULD THEY DECIDE TO SEEK REVIEW OF ANY FINAL ORDER OF DEPORTATION	15
III. THE FIRST AMENDMENT DOES NOT REQUIRE THAT RESPONDENTS OBTAIN IMMEDIATE JUDICIAL REVIEW OF THEIR CONSTITUTIONAL CLAIMS	20
IV. THIS CASE PROVIDES A STARK EXAMPLE OF THE THREAT TO NATIONAL SECURITY THAT CAN ARISE IF THE APPEALS COURT'S LAX JURISDICTIONAL STANDARDS ARE ADOPTED	25
CONCLUSION	28

TABLE OF AUTHORITIES

	Page
Cases:	
<i>Abney v. United States</i> , 431 U.S. 651 (1977)	22
<i>Almendarez-Torres v. United States</i> , 118 U.S. 1219 (1998)	12, 14
<i>Carlson v. Landon</i> , 342 U.S. 524 (1952)	16
<i>Doe v. Webster</i> , 486 U.S. 592 (1988)	13
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council</i> , 485 U.S. 568 (1988)	14
<i>Federal Trade Comm'n v. Std. Oil Co. of California</i> , 449 U.S. 232 (1980)	23
<i>Felker v. Turpin</i> , 116 S. Ct. 2333 (1996)	19
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	20, 21
<i>Helstocki v. Meanor</i> , 442 U.S. 500 (1979)	22
<i>Milkovich v. Lorain Journal Co.</i> , 497 U.S. 1 (1990)	21
<i>Stone v. Immigration and Naturalization Service</i> , 514 U.S. 386 (1995)	26
<i>Trainmen v. Baltimore & Ohio R. Co.</i> , 331 U.S. 519 (1947)	12
<i>United States v. Armstrong</i> , 116 S. Ct. 1480 (1996)	18
<i>United States ex rel. Turner v. Williams</i> , 194 U.S. 279 (1904)	16
<i>United States v. Jim Fuey Moy</i> , 241 U.S. 394 (1916)	14

Page

<i>United States v. MacDonald</i> , 435 U.S. 850 (1978)	22, 23, 24
<i>United States v. Hollywood Motor Car Co.</i> , 458 U.S. 263 (1982)	24
<i>Yang v. Immigration and Naturalization Service</i> , 109 F.3d 1185 (7th Cir. 1997)	19
<i>Younger v. Harris</i> , 401 U.S. 37 (1971)	20, 21

Statutes and Constitutional Provisions:

U.S. Const., Art. I, § 9, cl. 2	19
U.S. Const., Speech or Debate Clause	22, 23, 24
U.S. Const., Amend I	<i>passim</i>
U.S. Const., Amend V, Double Jeopardy Clause	22, 23, 24
U.S. Const., Amend VI, Speedy Trial Clause	22
Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. . No. 104-132	23
§ 302(a), 8 U.S.C. § 1189(a)	23
Illegal Immigration Reform and Immigrant Responsi- bility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C, 110 Stat. 3009	<i>passim</i>
§ 306(a)	10

	Page
Immigration and Naturalization Act	7
8 U.S.C. § 1182(a)(3)(B)(iii)	4
8 U.S.C. § 1221 - 1231	11
8 U.S.C. § 1227(a)(4)(B)	4
8 U.S.C. § 1251(a)(2)	4
8 U.S.C. § 1251(a)(6)(F)(iii) (1982)	4
8 U.S.C. § 1251(a)(9)	4
8 U.S.C. § 1252	<i>passim</i>
8 U.S.C. § 1252(a)	12, 16
8 U.S.C. § 1252(b)(4)(A)	17
8 U.S.C. § 1252(b)(4)(C)	17
8 U.S.C. § 1252(f)	<i>passim</i>
8 U.S.C. § 1252(f)(1)	11, 12
8 U.S.C. § 1252(g)	<i>passim</i>
8 U.S.C. § 1255a	3
8 U.S.C. § 1329	15
28 U.S.C. § 1331	15
28 U.S.C. § 2347(b)(3)	9, 16-17, 18, 19
Miscellaneous:	
62 Fed. Reg. 52,650 (Oct. 8, 1997)	23
Agence France-Presse, "Israel Arrests 10 Suspected PFLP Members Near Ramallah," (Dec. 5, 1997) .	27
Agence France Presse, "Palestinian Group Denounces 'U.S. Threats' Against Baghdad," (Nov. 10, 1997)	27
Sunday Times of London, "Kill the Jackel," (Dec. 14, 1997)	26

INTERESTS OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center with supporters in all 50 states.¹ While WLF engages in litigation in a wide variety of areas, WLF devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared before this Court as well as other federal courts to ensure that aliens who engage in terrorism or other criminal activities are not permitted to pursue their criminal goals while in this country. *See, e.g., Ogbomon v. United States*, 117 S. Ct. 725 (1997); *Immigration and Naturalization Service v. Elramly*, 117 S. Ct. 31 (1996); *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988). WLF filed a brief in support of granting the petition for a writ of certiorari in this case.

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

The Jewish Institute for National Security Affairs (JINSA) is a nonprofit, nonpartisan educational organization committed to explaining the need for a prudent national security policy to the U.S., addressing the security requirements of both the U.S. and the State of Israel, and strengthening the strategic cooperative relationship between these two democracies. Founded as a result of the lessons

¹ Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

learned from the 1973 Yom Kippur War, JINSA communicates with the national security establishment and the general public to explain the role Israel can and does play in bolstering American interests, as well as the link between American defense policy and the security of Israel.

The Jewish Policy Center is a § 501(c)(3) organization dedicated to creating, articulating, examining, and advocating conservative approaches to social, economic, and foreign policy issues from the perspective of the Jewish community. By providing a particularly Jewish insight, the JPC hopes to make a unique and valuable contribution to the ongoing policy debates affecting our community, our country, and our world.

U.S. Representative Gerald Solomon is Chairman of the House Rules Committee. As a Member of the House of Representatives, Rep. Solomon strongly supported adoption of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208. Among other things, IIRIRA was intended to streamline deportation proceedings by preventing judicial interference with ongoing proceedings. Rep. Solomon believes that the decision below, by permitting Respondents to litigate their constitutional claims in advance of entry of a final order of deportation, subverts the intent of IIRIRA.

The Popular Front for the Liberation of Palestine has been determined by Secretary of State Madeleine Albright to be a "foreign terrorist organization." The United States has a vital interest in taking strong measures to combat international terrorists who threaten our national security. *Amici* believe that one effective measure is denying American fundraising sources to such organizations. But such

measures are effective only if swiftly implemented. They cannot be effective if those targeted for deportation are permitted, as here, to drag out the deportation process for more than a decade by maintaining collateral federal-court challenges to deportation proceedings.

Amici submit this brief in support of Petitioners with the written consent of all parties. The written consents are on file with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby incorporate by reference the Statement contained in Petitioners' brief.

In brief, the federal government has been attempting since 1987 to deport eight aliens because they have engaged in fundraising for the Popular Front for the Liberation of Palestine (PFLP), a terrorist organization that has proclaimed the United States to be one of its principal enemies. The federal government has been unable to go forward with those proceedings, however, due to an injunction issued by the United States District Court for the Central District of California.

At the time that deportation proceedings were initiated in January 1987, two of the eight Respondents (Khader Hamide and Michel Shehadeh) were permanent resident aliens; the other six were in this country under temporary visas. Two of those six (Aiad Barakat and Naim Sharif) recently were granted temporary resident status pursuant to 8 U.S.C. § 1255a; the other four (Julie Mungai, Amjad Obeid, Oyman Obeid, and Bashar Amer) concede that their

continued presence in this country violates the terms of their temporary visas, which have long since expired.

The four non-resident aliens are alleged to be deportable on the ground that they failed to maintain student status (8 U.S.C. § 1251(a)(9)), worked without authorization, or overstayed a visit (8 U.S.C. § 1251(a)(2)). See Petition Appendix ("Pet. App.") 79a-81a. The two permanent resident aliens (Hamide and Shehadeh) initially were alleged to be deportable under 8 U.S.C. § 1251(a)(6)(F)(iii) (1982) as "members of . . . [an] organization that advocates or teaches . . . the unlawful damage, injury, or destruction of property." Following revision of the immigration laws in 1990, the Immigration and Naturalization Service (INS) added charges against Hamide and Shehadeh under 8 U.S.C. § 1227(a)(4)(B), which renders deportable any alien who "at any time after entry engages in terrorist activity."² The two temporary resident aliens (Barakat and Sharif) were alleged to be deportable for visa violations. Pet. App. 3a-4a. The federal government concedes that, as a result of their recent receipt of temporary resident status, Barakat and Sharif are no longer subject to deportation on the visa violation charges (Pet. at 7 n.4), and there are no other charges currently pending against those two.

Respondents filed suit in federal district court in April 1987, seeking an injunction against the deportation pro-

² The term "engage in terrorist activity" is defined under 8 U.S.C. § 1182(a)(3)(B)(iii) to include committing "an act which the actor knows, or reasonably should know, affords material support to any individual, organization, or government in conducting a terrorist activity," including "[t]he soliciting of funds or other things of value for terrorist activity or for any terrorist organization."

ceedings. They claimed that basing deportation on their fundraising activities for the PFLP violated their rights under the First Amendment. They also claimed that *all* of the charges (including those alleging visa violations) infringed on their constitutional rights against "selective enforcement" because the charges allegedly were filed in retaliation for their association with the PFLP. Pet. App. 5a.

The district court issued a preliminary injunction in 1994, barring further deportation proceedings based on the visa violation charges against the non-resident alien Respondents. Pet. App. 138a-150a. It found that those Respondents were likely to succeed on their selective prosecution claims, because they had demonstrated that the INS had not brought similar deportation proceedings against those associated with terrorist groups whose views the federal government endorses or tolerates. *Id.* The U.S. Court of Appeals for the Ninth Circuit affirmed the injunction, but reversed the district court's ruling that it lacked jurisdiction over the claims of the two permanent resident aliens (Hamide and Shehadeh). Pet. App. 77a-128a ("*American-Arab I*").

On remand, Petitioners offered extensive additional evidence to the district court regarding the extent of Respondents' fundraising activities for the PFLP and the widespread nature of the PFLP's terroristic activities. The district court nonetheless refused to dissolve the existing injunction and broadened it to include a prohibition of proceedings against Respondents Hamide and Shehadeh. Pet. App. 44a-76a.

While the government's appeal from the district court injunction was pending, Congress adopted the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, Div. C, 110 Stat. 3009. IIRIRA amended 8 U.S.C. § 1252(g) to impose strict limits on federal court review of non-final INS actions.

Based on § 1252(g), the government filed a motion in 1996 in the district court to dismiss the suit and to vacate the injunction. The district court denied the motion, finding that § 1252(g) did not apply to First Amendment claims such as those being raised by Respondents. Pet. App. 22a-44a.

In July 1997, the Ninth Circuit affirmed both the district court's decision on jurisdiction and its decision to keep the injunction in place. Pet. App. 1a-21a.

The Ninth Circuit acknowledged that § 1252(g) applied retroactively to cases, such as Respondents', that were pending on the date of IIRIRA's adoption. Pet. App. 7a-8a. The court noted, however, that § 1252(g) explicitly contemplates exceptions to its ban on federal court jurisdiction,³ and it held that this case fell within one of those exceptions -- the one allegedly created by 8 U.S.C. § 1252(f). The appeals court noted that § 1252(f) prohibits any court other than the Supreme Court from issuing injunctions against "the operation of [relevant provisions of the Immigration and Naturalization Act] . . . other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated." The appeals court held that the last clause of § 1252(f) permits individual aliens such as Respondents to seek judicial review of on-going deportation proceedings, at

³ The appeals court was referring to the first clause of § 1252(g), which states, "Except as provided in this section . . ."

least to the extent that the individual aliens are raising constitutional claims. Pet. App. 9a-11a.

The Ninth Circuit held that any other interpretation of § 1252 "would present serious constitutional problems." Pet. App. 12a. The court held that Respondents, if forced to await completion of deportation proceedings before turning to the federal courts, would not be able obtain satisfactory review of their selective enforcement claims. The court noted that the none of the administrative bodies within the INS has authority to consider a selective enforcement claim during deportation proceedings, and stated that a federal appeals court reviewing a final order of deportation would lack the factual record necessary to adjudicate such a claim. *Id.*

The Ninth Circuit assumed, without deciding, that Respondents could raise their First Amendment claims by seeking habeas corpus relief from a final order of deportation. Pet. App. 14a. The appeals court nonetheless held that such relief would not adequately protect Respondents' First Amendment rights: "*prompt* judicial review of [Respondents'] claims [is] required because violation of [Respondents'] First Amendment interests would amount to irreparable injury that cannot be vindicated by post-deprivation remedies." Pet. App. 15a (emphasis in original) (quoting *American-Arab I*, Pet. App. 77a-128a).

With three judges dissenting, the Ninth Circuit denied the government's motion for rehearing with suggestion for rehearing en banc. Pet. App. 246a-247a. The dissenters would have held that § 1252(g) deprived the federal courts of jurisdiction to hear Respondents' claims. Pet. App. 247a-252a.

On June 1, 1998, this Court agreed to hear one of two issues presented by the government's certiorari petition. The Court agreed to consider whether the courts below had jurisdiction to hear Respondents' selective enforcement claims, but declined to consider the merits of those claims.

SUMMARY OF ARGUMENT

As amended by IIRIRA, the Immigration and Naturalization Act could not be clearer that the lower federal courts lack jurisdiction to entertain challenges to deportation proceedings prior to the entry of a final order of deportation. 8 U.S.C. § 1252(g) now states plainly that the lower federal courts have *no* jurisdiction to review INS actions other than as provided for in § 1252. While that section provides jurisdiction for review of *final* deportation orders, it does not permit federal-court challenges -- as here -- to on-going deportation proceedings.

The Ninth Circuit's conclusion that 8 U.S.C. § 1252(f) provides such jurisdiction is totally unfounded. Section 1252(f) -- as its title suggests -- is intended as a *limit* on federal jurisdiction, not (as the appeals court concluded) a significant expansion of jurisdiction. The appeals court's interpretation of § 1252(f) is totally implausible, and thus it was unwarranted in resorting to the doctrine that a statute should be construed, *if fairly possible*, so as to avoid potentially unconstitutional interpretations.

In any event, *amici's* interpretation of § 1252(g) does not render that statute unconstitutional. As interpreted by *amici*, § 1252(g) still permits Respondents to obtain judicial review of their constitutional claims. It merely requires Respondents to exhaust their administrative remedies prior

to doing so. If, on review of a final order of deportation, there are any disputes over material facts, they can be resolved by resort to a remand to the district court pursuant to 28 U.S.C. § 2347(b)(3); and such disputes could also be resolved in connection with a habeas corpus petition. The Ninth Circuit's conclusion that vindication of Respondents' First Amendment rights requires that Respondents not be required to adhere to normal exhaustion requirements is unfounded. The First Amendment does not protect individuals from the expense and annoyance of litigation, which are among the costs of living under government.

Finally, *amici* believe that this case provides a stark example of the threat to national security that can arise if the Ninth Circuit's lax jurisdictional standards are adopted. Respondents stand accused of engaging in fundraising for the PFLP, one of the most violent and anti-American terrorist groups in the world today. When the elected branches of government determine (as here) that deportation proceedings should be initiated against terrorist fundraisers, national security demands that resolution of those proceedings not be delayed for more than a decade. Congress adopted IIRIRA in order to prevent such delays from occurring. If the courts ignore that congressional intent, they strip our nation of the power to take swift and decisive actions to combat international terrorists who threaten our national security.

ARGUMENT

I. IIRIRA DIVESTS FEDERAL COURTS OF ALL JURISDICTION TO HEAR CHALLENGES TO ON-GOING DEPORTATION PROCEEDINGS

As amended by IIRIRA, the Immigration and Naturalization Act could not be clearer that the lower federal courts lack jurisdiction to entertain challenges to deportation proceedings prior to the entry of a final order of deportation.

As amended by § 306(a) of IIRIRA, 8 U.S.C. § 1252(g) provides:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

The Ninth Circuit recognized that § 1252(g) applies retroactively to cases, such as Respondents', that were pending at the time that IIRIRA was adopted in 1996. Pet. App. 7a-8a. Respondents do not contest that theirs is a case that "aris[es] from the decision or action by the Attorney General to commence proceedings" to deport them. Thus, § 1252(g) unequivocally provides that "no court shall have jurisdiction" to hear Respondents' case "[e]xcept as provided" in § 1252.

The only subsection of § 1252 that Respondents and the Ninth Circuit have pointed to as a jurisdictional grant

allowing the federal courts to hear this case is § 1252(f)(1). Section 1252(f)(1) provides in full:

Limit on injunctive relief. (1) In general. Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of chapter 4 of title II [8 U.S.C. §§ 1221 *et seq.*], as amended by [IIRIRA], other than with respect to the application of such provisions to an individual alien against whom proceedings under such chapter have been initiated.⁴

The Ninth Circuit interpreted the final clause of § 1252(f)(1) as an affirmative grant of jurisdiction to the federal courts, and thus as one of the exceptions -- to § 1252(g)'s jurisdiction ban -- contemplated by the first clause of § 1252(g) ("[E]xcept as provided in this section . . ."). Pet. App. 10a-11a. Respondents endorse that interpretation. Respondents' Brief in Opposition to Certiorari ("Opp. Br.") at 14-15.

The Ninth Circuit's interpretation of § 1252(f)(1) is untenable. As the title of § 1252(f) states, that subsection is intended to "limit" federal court jurisdiction, not to expand it.⁵ Section 1252(f) makes clear that *under no cir*

⁴ "[C]hapter 4 of title II" refers to statutory provisions governing inspection, apprehension, examination, exclusion, and removal of aliens. See 8 U.S.C. §§ 1221-1231.

⁵ "[T]he title of a statute and the heading of a section" are "tools (continued...)"

cumstances are federal courts to grant classwide injunctive relief against the operation of laws governing the inspection, apprehension, examination, exclusion, and removal of aliens, and at the same time acknowledges that there might be circumstances under which a court could entertain a request for injunctive relief against such operation as applied "to an individual alien." But acknowledging the *possibility* that injunctive relief on behalf of individual aliens might be proper in some instances⁶ is a far cry from an affirmative grant of jurisdiction to provide such relief.

As Judge O'Scannlain stated in his dissent from the denial of rehearing en banc, "[S]ubsection (f) is not a grant of jurisdiction of any kind, but rather an additional restriction on jurisdiction The exception within this subsection [relating to injunctive relief with respect to 'an individual alien'] is clearly only an exception to this subsection." Pet. App. 249a n.1.

⁵(...continued)

available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 118 S. Ct. 1219, 1226 (1998) (quoting *Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947)).

⁶ *Amici's* interpretation of § 1252(f)(1) does not render the final clause of that subsection meaningless. There clearly *are* instances in which Congress has bestowed jurisdiction on the federal courts to grant injunctive relief on behalf of individual aliens. For example, most final deportation orders are reviewable pursuant to 8 U.S.C. § 1252(a), and an injunction will often be the appropriate remedy for an improperly issued final deportation order. Section 1252(f)(1) makes clear that the scope of any such injunction must be limited to individual aliens and must not include classwide relief from enforcement of some aspect of the applicable immigration laws.

The Ninth Circuit's reading of § 1252(f) is implausible for the additional reason that it creates an exception so large as to swallow § 1252(g)'s rule prohibiting judicial review of nonfinal orders. Under the Ninth Circuit's reading, the federal courts have jurisdiction to grant an injunction to *every* alien seeking individual relief. Perhaps recognizing the implausibility of that construction, the appeals court sought to limit its holding to those seeking "judicial review of constitutional claims." Pet. App. 11a. But the court made no effort to tie its limitation to any specific language contained § 1252(f). Indeed, there is no such language; if Respondents are permitted to invoke federal court jurisdiction on the basis of § 1252(f), then so can any individual alien not seeking classwide relief and against whom inspection, apprehension, examination, exclusion, or removal proceedings have been initiated. In sum, the appeals court's reading is untenable; it is not plausible that Congress would adopted § 1252(g)'s jurisdiction-restricting language and then simultaneously adopt language in § 1252(f) that would to a large measure undercut the purposes § 1252(g).

The appeals court asserted that it arrived at its interpretation of § 1252(f) in order avoid the "serious constitutional question[s] that would arise if a federal statute were construed to deny any forum for a colorable constitutional claim." Pet. App. 10a (quoting *Doe v. Webster*, 486 U.S. 592 (1988)). *Amici* discuss more fully below why the government's interpretation of § 1252 is not constitutionally suspect. In any event, in light of the absence of any significant ambiguity in the meaning of § 1252(f), there is no basis in this case for applying the doctrine that "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

Almendarez-Torres, 118 S. Ct. at 1228 (citing *United States v. Jim Fuey Moy*, 241 U.S. 394, 401 (1916)). That doctrine is applicable only when "the statute [is] genuinely susceptible to two constructions." *Id.* When, as here, a proffered statutory construction "is plainly contrary to the intent of Congress," there can be no justification for adopting that construction as a means of avoiding constitutional difficulties. *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988).

The Ninth Circuit also justified its interpretation of § 1252(f) as necessary to give meaning to the first clause of § 1252(g) ("Except as provided in this section. . ."). The appeals court argued that that first clause would be meaningless unless the court could identify within § 1252 at least one exception to § 1252(g)'s jurisdictional bar. Pet. App. 9a. The court then hit upon § 1252(f) as the most likely "candidate" and construed it accordingly. *Id.* But in its search for an exception the court need not have looked any farther than § 1252(a), which provides jurisdiction in the federal appeals courts over most final deportation orders. Accordingly, the appeals court's desire to lend meaning to the first clause of § 1252(g) adds nothing to its interpretation of § 1252(f).

Respondents raise one additional argument in support of the Ninth Circuit's interpretation of § 1252(f). Respondents assert that the first clause of § 1252(g) exempts from its jurisdictional bar all exceptions to the bar "provided in this section [i.e., § 1252]." Opp. Br. 15 n.7. They further assert that even if the last clause of § 1252(f) is viewed as creating an exception to the jurisdictional bar rather than creating an affirmative source of jurisdiction, that exception

is sufficient to permit Respondents to "fall back on general federal jurisdiction, 28 U.S.C. § 1331, and on 8 U.S.C. § 1329, providing district court jurisdiction for actions arising under the INA." *Id.*

Respondents argument is based on a misreading of § 1252(f). The last clause of § 1252(f) is *not* an exception to § 1252(g)'s all-encompassing jurisdictional bar; rather, it is a limitation on the scope of § 1252(f)'s jurisdictional bar with respect to injunctive relief. Nothing in the last clause of § 1252(f) so much as suggests that Congress intended to create an exception from § 1252(g)'s general rule that § 1252 is to be the sole source of federal court jurisdiction over challenges to actions taken by the Attorney General in immigration-related matters.

In sum, 8 U.S.C. § 1252(g) expresses Congress's clear intent that there is no jurisdiction in the lower federal courts to entertain challenges to deportation proceedings prior to the entry of a final order of deportation. In the absence of such an order in this case, Respondents' case must be dismissed.

II. RESPONDENTS WILL BE ABLE TO DEVELOP AN ADEQUATE FACTUAL RECORD SHOULD THEY DECIDE TO SEEK REVIEW OF ANY FINAL ORDER OF DEPORTATION

As noted above, the Ninth Circuit justified its interpretation of § 1252(f) as an effort to avoid constitutional difficulties it saw in the government's interpretation. One of those "difficulties" was Respondents' alleged inability, in any appeal from a final deportation order, to develop a

factual record in support of their selective enforcement claim. Pet. App. 12a.

Amici agree with Respondents that they are entitled at some point to a judicial forum within which to raise their First Amendment claims.⁷ But IIRIRA does not deny them such a forum; it requires Respondents to exhaust all administrative remedies before going into federal court, but ensures that they eventually will have their day in court on all claims. See 8 U.S.C. § 1252(a).

Respondents are correct that they will not be permitted to raise their selective enforcement claims in connection with administrative proceedings before the INS. But Respondents and the Ninth Circuit have failed to explain convincingly why 28 U.S.C. § 2347(b)(3) would not provide an adequate fact-finding forum for any disputed issues of material fact related to Respondents' constitutional claims. Section 2347(b)(3) permits transfer from the appeals court to the district court for resolution of material factual issues not addressed in the administrative record.⁸ Thus, if a final

⁷ But see *Carlson v. Landon*, 342 U.S. 524, 537 & n.28 (1952) ("The power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, 'with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.' . . . No judicial review is guaranteed by the Constitution.") (quoting *United States ex rel. Turner v. Williams*, 194 U.S. 279, 290-91 (1904)).

⁸ 28 U.S.C. § 2347(b) provides in pertinent part:

(b) When an agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall
(continued...)

order of deportation is issued against Respondents and they seek review in a federal appeals court, any disputed issues of material fact not addressed in the administrative proceedings can be resolved by means of a transfer to a district court.

The Ninth Circuit held that 8 U.S.C. § 1252(b)(4)(A) precludes resort to § 2347(b)(3) transfers in immigration cases. Pet. App. 13a. Section 1252(b)(4)(A) provides that in cases seeking review of deportation orders, "the court of appeals shall decide the petition only on the administrative record on which the order of removal is based." But § 1252(b)(4) nonetheless appears to contemplate that the appeals court may consider issues not passed on in the administrative proceedings. For example, § 1252(b)(4)(C) provides that decisions of the Attorney General regarding admission to the United States can be overturned if "manifestly contrary to law." A deportation order issued in violation of an alien's constitutional rights would be manifestly contrary to law, and thus the appeals courts are empowered to employ whatever tools are necessary

⁸(...continued)

determine whether a hearing is required by law. After that determination, the court shall --

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented.

(including § 2347(b)(3)) to determine whether an alien's constitutional rights have been violated.

In any event, a decision permitting § 2347(b)(3) fact-finding in connection with judicial review of final orders of deportation would be far more faithful to congressional intent than the would the procedure permitted by the Ninth Circuit: an extra-statutory cause of action in the district court, filed while administrative proceedings are on-going. This is not to say that fact finding would necessarily be required in this case in connection with any appeal from a final order of deportation. *Amici* note, for example, that even in criminal cases the defendant must make an extraordinarily strong showing of selective enforcement before they are entitled to any discovery on the issue. *United States v. Armstrong*, 116 S. Ct. 1480 (1996). But should a genuine issue of material fact arise in connection with Respondents' constitutional claims, § 2347(b)(3) provides the method for resolution of those factual issues that is most consistent with congressional intent.

Finally, were the Court to find that § 2347(b)(3) were unavailable as a method by which an appeals court could resolve disputed issues of material fact, Respondents would nonetheless be entitled to press their constitutional claims in connection with an application for a writ of habeas corpus. Indeed, the Ninth Circuit accepted the possibility that Respondents could obtain complete review of their constitutional claims through habeas corpus review. Pet. App. 14a. The court said, however, that even if such review were available, it would not constitute a "satisfactory avenue for review" of Respondents' constitutional claims because it would not be sufficiently prompt. *Id.* at 14a-15a.

Given the Ninth Circuit's concession, its arguments regarding § 2347(b)(3) add nothing to Respondents' case.

Moreover, constitutional habeas corpus review quite clearly *is* available, should Respondents be found to lack an adequate means of seeking review of their constitutional claims in connection with a petition for review of a final deportation order. Article I, § 9, clause 2 of the Constitution protects the writ of habeas corpus from suspension except "when in Cases of Rebellion or Invasion the public Safety may require it." IIRIRA plainly does *not* suspend the availability of the Great Writ. The Court in *Felker v. Turpin*, 116 S. Ct. 2333 (1996), noted that it had had jurisdiction since at least 1789 to hear original habeas corpus petitions and that it therefore assumed that Congress would not repeal such jurisdiction by implication. *Felker*, 116 S. Ct. at 2337-39. In the absence of any language in IIRIRA stating that the Supreme Court does not have jurisdiction to entertain original habeas petition filed by those raising constitutional objections to a final order of deportation, it must be assumed that the Court still retains such jurisdiction. It may well be that § 1252(g) strips the lower federal courts of such jurisdiction (*see Yang v. Immigration and Naturalization Service*, 109 F.3d 1185, 1195-96 (7th Cir. 1997)), but original habeas corpus jurisdiction in the Supreme Court is still available.

In sum, even assuming that Respondents have a constitutional right to judicial review of their constitutional claims, they will have an opportunity for adequate judicial review of their claims if and when a final order of deportation is issued.

III. THE FIRST AMENDMENT DOES NOT REQUIRE THAT RESPONDENTS OBTAIN IMMEDIATE JUDICIAL REVIEW OF THEIR CONSTITUTIONAL CLAIMS

The Ninth Circuit also held that its interpretation of § 1252(f) was necessary in order to vindicate Respondents' alleged right to "prompt" review of their constitutional claims. Pet. App. 15a. It is not enough to allow judicial review following entry of a final order of deportation, the appeals court held, "because violation of [Respondents'] First Amendment interests would amount to irreparable injury that 'cannot be vindicated by post-deprivation remedies.'" *Id.* (quoting *American-Arab I*, Pet. App. 77a-128a).

The Ninth Circuit cited no Supreme Court case law in support of its conclusion that "prompt" review is constitutionally mandated. That omission is unsurprising, given the absence of such authority.

The two Supreme Court decisions (*Younger v. Harris*, 401 U.S. 37 (1971), and *Freedman v. Maryland*, 380 U.S. 51 (1965)) cited by Respondents (Opp. Br. 15-16 n.9) do not support their claim to a right to immediate review of all First Amendment claims. *Freedman* involved an appeal by a criminal defendant who was convicted of violating a Maryland law that required individuals to submit motion pictures to the Maryland State Board of Censors for approval prior to exhibiting the film. The Court held that the law was an invalid prior restraint on free speech because the approval process contained insufficient safeguards to ensure that First Amendment rights would be respected. But the Court made clear that its ruling was limited to cases in

which the government sought to restrain speech *in advance* of judicial review. *Freedman*, 380 U.S. at 58-59. *Freedman* gives no indication that the First Amendment limits the power of government to subject individuals to administrative proceedings *after* the speech has been uttered, as is the case here.

The other case cited by Respondents, *Younger*, is actually supportive of the government's position. *Younger* held that federal courts virtually never should interfere with on-going state criminal prosecutions, even when the prosecution is alleged to chill the defendant's exercise of his First Amendment or other constitutional rights. *Younger*, 401 U.S. at 54. The Court stated, "[T]he existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action." *Id.* at 51.

The contrary rule announced by the Ninth Circuit would result in a major upheaval in established First Amendment law. For example, libel actions undoubtedly have some chilling effect on the exercise of First Amendment rights. Yet, the First Amendment has never been thought to protect a speaker from the time and expense of a full-fledged libel trial, even if the speaker believes that he can establish conclusively that none of the words he uttered were false. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Under the Ninth Circuit's theory, defendants would be entitled to summary disposition of all libel claims brought against them, without permitting the plaintiff an opportunity to establish his case through discovery, as well as immediate appeal from orders denying summary disposition.

The Court has established a very limited class of constitutional rights that require protection not only at the conclusion of judicial and/or administrative proceedings, but also at the outset of such proceedings. In *Abney v. United States*, 431 U.S. 651 (1977), the Court held that the Double Jeopardy Clause protects individuals against having to stand trial twice for the same crime, not merely against being twice punished. *Abney*, 431 U.S. at 661. Thus, a federal defendant whose motion to dismiss criminal charges on Double Jeopardy Clause grounds is denied, is entitled to appeal that denial immediately, without awaiting completion of a trial. *Id.* at 662. Similarly, the Speech or Debate Clause protects Congressmen from ever having to answer for their protected speech, and thus Congressmen are entitled to an immediate appeal from denial of a motion to dismiss a criminal indictment on Speech or Debate Clause grounds. *Helstocki v. Meanor*, 442 U.S. 500 (1979).

First Amendment rights have never been thought to fall within this extremely limited class of constitutional rights whose vindication requires immediate judicial review of claims that those rights have been violated. There is no constitutional right not to be forced into litigation over matters that arguably tread upon one's First Amendment rights. Unlike in cases involving claims under the Double Jeopardy Clause or the Speech or Debate Clause, this case does not involve "an asserted right the legal and practical value of which would be destroyed if not vindicated before trial." *United States v. MacDonald*, 435 U.S. 850, 860 (1978). As the Court explained, in denying a right to immediate appeal of Speedy Trial Clause claims:

Admittedly there is value -- to all but the most unusual litigant -- in triumphing before trial, rather than after it,

regardless of the substance of the winning claim. But this truism is not to be confused with the quite distinct proposition that certain claims (because of the substance of the rights entailed, rather than the advantage to a litigant in winning his claim sooner) should be resolved before trial.

Id. at 860 n.7. There is nothing in the nature of First Amendment rights that renders them worthless if not vindicated before trial. Under such circumstances, requiring Respondents to exhaust their administrative remedies before raising their First Amendment claims in federal court does not constitute "irreparable harm" because the "expense and annoyance of litigation is part of the social burden of living under government." *Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980).

Moreover, the pendency of deportation proceedings against Respondents is unlikely to chill their expressive activities to any appreciable degree. After Respondents engaged in the conduct at issue in this case, Congress adopted a law making it a criminal offense to raise funds for "foreign terrorist organizations," and the PFLP has now been designated as such an organization by the Secretary of State. See Antiterrorism and Effective Death Penalty Act of 1996, § 302(a), 8 U.S.C. § 1189(a); 62 Fed. Reg. 52,650 (Oct. 8, 1997) (Secretary of State's designation of PFLP and 29 other groups as "foreign terrorist organizations"). Accordingly, quite apart from the pendency of deportation proceedings, Respondents have very good reason to discontinue any fundraising on behalf of the PFLP.

Finally, placing First Amendment rights on a par with Double Jeopardy Clause and Speech or Debate Clause rights

would seriously erode the policies underlying exhaustion-of-remedies and no-interlocutory-appeals requirements. As the Court noted in *MacDonald*, double jeopardy claims are not easily made -- they require "at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense." *MacDonald*, 435 U.S. at 862. Speech or Debate Clause claims are similarly unusual, given the limited class of individuals who are eligible to invoke that clause. But First Amendment rights are far more easily asserted. Virtually all conduct has some arguably expressive component, and thus many litigants seeking to avoid sanction for their conduct can raise a colorable First Amendment defense. The Court in *MacDonald* cited the ease with which a constitutionally based defense could be raised (in that case, a claim under the Speedy Trial Clause) as one reason not to permit interlocutory appeal of denial of such claims. *Id.* Accordingly, the ease with which First Amendment claims could be raised in an effort to fight deportation counsels strongly against permitting collateral First Amendment attacks on ongoing deportation proceedings.

In sum, Respondents have failed to demonstrate why their First Amendment rights cannot be fully vindicated if they are required, like others required involuntarily to participate in judicial and/or administrative proceedings, to abide by the procedural rules established by Congress while seeking to assert those rights. This is not a case in which Respondents are being denied judicial review of their constitutional claims altogether; they are merely being asked to follow normal procedures in seeking such review. Such delays in final adjudication of constitutional rights "is one of the painful obligations of citizenship." *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 268 n.2 (1982)

(denying immediate appeal of denial of motion to dismiss indictment based on prosecutorial vindictiveness).

IV. THIS CASE PROVIDES A STARK EXAMPLE OF THE THREAT TO NATIONAL SECURITY THAT CAN ARISE IF THE APPEALS COURT'S LAX JURISDICTIONAL STANDARDS ARE ADOPTED

This case raises fundamental questions about the power of Congress and the Executive Branch to control the flow of aliens into this country and to protect American security interests by excluding those aliens deemed to represent a threat to American interests.

A decade has passed since the INS determined that Respondents' continued presence in this country represented a sufficient threat to national security to warrant initiation of deportation proceedings. Yet, due to the interference of the lower federal courts, the INS has been unable to go forward with those proceedings -- even though the courts have done no more than issue a "preliminary" finding that the administrative proceedings are improper. When the elected branches of government determine (as here) that deportation proceedings should be initiated against terrorist fundraisers, national security demands that resolution of those proceedings not be delayed for a decade or more. It is precisely by permitting collateral attacks on deportation proceedings -- attacks nowhere contemplated in the immigration laws -- that the federal courts contribute to unwarranted and security-impairing delays in the deportation process.

The courts must continue to be mindful that "every delay works to the advantage of the deportable alien who

wishes merely to remain in the United States." *Stone v. Immigration and Naturalization Service*, 514 U.S. 386 (1995). It was precisely to counter such delays that Congress adopted IIRIRA; the lower federal courts should be sent a clear message that IIRIRA does not countenance decades-long challenges to the mere institution of deportation proceedings.

Such a message would be especially appropriate in this case due to the particularly violent and anti-American nature of the PFLP. There are very few terrorist groups in the world today that pose as great a threat to American security as does the PFLP. If allowed to stand, the Ninth Circuit's decision is an open invitation to the PFLP to increase its American-based fundraising and to use those funds to increase activities that threaten American lives.

As the petition for certiorari indicates, the PFLP recently celebrated the 30th anniversary of its 1967 founding. It has long proclaimed the United States to be one of its principal enemies. Among its many acts of international terrorism, the PFLP has hijacked numerous planes, killed 16 Americans at Israel's Lod Airport, and assassinated the U.S. Ambassador to Lebanon in 1976. Pet. at 2.

One of the PFLP's best-known members was Venezuelan-born terrorist Illich Ramirez Sanchez, better known as "Carlos the Jackel." Carlos received his training from the PFLP and, acting under the auspices of the PFLP, masterminded the kidnapping of OPEC oil ministers in Vienna in 1975. See, "Kill the Jackel," Sunday Times of London (Dec. 14, 1997).

The PFLP has been bitterly opposed to the 1993 Oslo peace accords between Israel and the Palestinian Liberation Organization (PLO), has suspended its participation in the PLO, and has been engaged in terrorist activity designed to undermine those accords. It has been implicated in numerous drive-by shooting attacks on Israeli citizens in recent months. See, "Israel Arrests 10 Suspected PFLP Members Near Ramallah," Agence France-Presse (Dec. 5, 1997). It recently issued a statement denouncing United States "threats" against Iraq and calling on Arab nations to "defy" the U.S. and "stand up to the policies of Washington." See, "Palestinian Group Denounces 'U.S. Threats' Against Baghdad," Agence France-Presse (Nov. 10, 1997).

Surely, given the PFLP's history, the federal government has a strong interest in protecting American national interests by doing all it can to deny funding to the PFLP. Respondents do not dispute that they provided such funding, nor do they dispute that they are well aware of the PFLP's bloody history and its avowed opposition to United States policies. The federal courts have no business providing a shield to those who fundraise in support of such terrorist activity. Regardless whether fundraisers personally support terrorist activity or whether (as Respondents claim) they merely support the terrorist group's nonviolent activities, such fundraisers are undeniably facilitating terrorist acts that threaten America's national security.

Amici recognize that the merits of Respondents' First Amendment claims are not now before the Court. Nonetheless, *amici* request that the Court bear in mind the significant national security implications of this case when determining whether Congress really intended to permit the kind of collateral review of administrative proceedings that

has resulted in more than a decade's delay in the conclusion of these proceedings.

CONCLUSION

Amici curiae Washington Legal Foundation, *et al.*, respectfully request that the Court reverse the judgment of the court of appeals.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: July 16, 1998

Counsel wish to acknowledge the assistance of Michael Griffin, a student at George Washington University Law School, in the preparation of this brief.

7
No. 97-1252

FILED

JUL 16 1998

OFFICE OF THE CLERK
COURT, U.S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, Attorney General, et al.,
Petitioners,
vs.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF THE
CRIMINAL JUSTICE LEGAL FOUNDATION
IN SUPPORT OF PETITIONERS**

KENT S. SCHEIDEGGER*
CHRISTINE M. MURPHY
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Telephone: (916) 446-0345

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

*Attorney of Record

29 pp

QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation?

TABLE OF CONTENTS

Question presented	i
Table of authorities	iv
Interest of <i>amicus curiae</i>	1
Summary of facts and case	2
Summary of argument	5
Argument	5

I

The underlying claims are cognizable on review of the final order of deportation under both prior and current law ...	5
A. Overview	5
B. Effective date	6
C. Cognizable claims	8

II

Review of the final order of deportation is the exclusive remedy	13
A. Statute's language and structure	13
B. Purpose and history	16
C. Meaningful review	18
Conclusion	23

TABLE OF AUTHORITIES

Cases

Agostini v. Felton, 521 U. S. ___, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997)	21
American-Arab Anti-Discrimination Committee v. Reno, 70 F. 3d 1045 (CA9 1995)	3, 4, 8, 11, 20, 21
American-Arab Anti-Discrimination Committee v. Reno, 119 F. 3d 1367 (CA9 1997)	Passim
American-Arab Anti-Discrimination Committee v. Thornburgh, 970 F. 2d 501 (CA9 1991)	2, 21
Block v. Community Nutrition Institute, 467 U. S. 340, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984)	15, 16
Board of Governors of Federal Reserve System v. MCorp Financial, Inc., 502 U. S. 32, 116 L. Ed. 2d 358, 112 S. Ct. 459 (1991)	19
Califano v. Sanders, 430 U. S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)	10
Foti v. Immigration and Nationalization Service, 375 U. S. 217, 11 L. Ed. 2d 281, 84 S. Ct. 306 (1963)	16
Huffman v. Pursue, Ltd., 420 U. S. 592, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975)	20
INS v. Chadha, 462 U. S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983)	8, 9
INS v. Doherty, 502 U. S. 314, 116 L. Ed. 2d 823, 112 S. Ct. 719 (1992)	22
Jean-Baptiste v. Reno, No. 97-6062 (CA2 May 8, 1998)	13

McKart v. United States, 395 U. S. 185, 23 L. Ed. 2d 194, 89 S. Ct. 1657 (1969)	22
McNary v. Haitian Refugee Center, Inc., 498 U. S. 479, 112 L. Ed. 2d 1005, 111 S. Ct. 888 (1991)	18
Stone v. INS, 514 U. S. 386, 131 L. Ed. 2d 465, 115 S. Ct. 1537 (1995)	22
Thunder Basin Coal Co. v. Reich, 510 U. S. 200, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994)	14, 15

United States Statutes

8 U. S. C. former § 1105a	6, 16
8 U. S. C. former § 1105a(a)	9, 12
8 U. S. C. former § 1105a(c)	18, 19
8 U. S. C. § 1101	5
8 U. S. C. § 1229a(a)(1)	11
8 U. S. C. § 1251	2, 11
8 U. S. C. § 1252	6, 16
8 U. S. C. § 1252(a)	18
8 U. S. C. § 1252(a)(1)	12
8 U. S. C. § 1252(a)(2)	13
8 U. S. C. § 1252(b)(4)(A)	12
8 U. S. C. § 1252(b)(9)	12, 13
8 U. S. C. § 1252(d)	18, 19
8 U. S. C. § 1252(g)	6, 7, 8, 17, 22
28 U. S. C. § 2254(b)(1)	20

28 U. S. C. § 2347(b)	10
28 U. S. C. § 2347(b)(1)	11
28 U. S. C. § 2347(b)(3)	11, 16
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-575 ..	6
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(c)(1), 110 Stat. 3009-612	7, 12
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309, 110 Stat. 3009-625	7, 8
S. Rep. No. 249, 104th Cong., 2d. Sess. (1996)	17
S. Rep. No. 48, 104th Cong., 1st Sess. (1995)	17

Treatises

A. Fragomen & S. Bell, Immigration Fundamentals— A Guide to Law and Practice (4th ed. 1997)	6, 17
C. Gordon, S. Mailman & S. Yale-Loehr, Immigration Law and Procedure (rev. ed. 1998)	18, 20, 22
R. Rotunda & J. Nowak, Treatise on Constitutional Law (2d ed. 1992)	15
C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure (2d ed. 1996)	21

Miscellaneous

Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953)	18
---	----

IN THE Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, Attorney General, et al.,
Petitioners,

vs.

AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, et al.,
Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)¹ is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society.

Society has a strong interest in being free from the threat of terrorism. The present case will affect the government's ability to rapidly and effectively deport persons supporting terrorist organizations. Delay in the deportation of these individuals is

1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

In 1987, the Immigration and Naturalization Service ("INS") began proceedings to deport eight alien members of the Popular Front for the Liberation of Palestine ("PFLP"). *American-Arab Anti-Discrimination Committee v. Reno*, 119 F. 3d 1367, 1370 (CA9 1997) ("*American-Arab II*"). The government contended that the "PFLP is an international terrorist and communist organization." *Ibid.* The organization, which has proclaimed the United States one of its enemies, has engaged in terrorist activity that has resulted in the deaths of at least 26 individuals, 17 of whom were United States citizens. See Pet. for Cert. 2. The FBI had uncovered evidence that the eight aliens were engaged in fundraising activities for the PFLP. See Pet. for Cert. 3. Based on this information, the initial deportation charges were drafted by the INS. Pet. for Cert. 3-4.

The INS originally charged the aliens with routine status violations under 8 U. S. C. §§ 1251(a)(2) and 1251(a)(9) and for one violation based on the group's fund-raising activities, a violation of 8 U. S. C. § 1251(a)(6). *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F. 2d 501, 504 (CA9 1991). Administrative remedies for the status violations proceeded through the steps of the Immigration and Nationality Act's ("INA") statutory review scheme. See *id.*, at 505, n. 2. The section 1251(a)(6) charge, on the other hand, became the basis for a challenge in federal district court by the American-Arab Anti-Discrimination Committee and the eight aliens. *American-Arab II*, *supra*, 119 F. 3d, at 1370. The original complaint filed in the district court claimed "that section 1251(a)(6)(D) violated the first and fifth Amendments, that the government engaged in selective prosecution in violation of the first and fifth Amendments, and that the INS procedures could not provide them with a fair and impartial hearing." *American-*

Arab Anti-Discrimination Committee v. Thornburgh, *supra*, 970 F. 2d, at 505. The plaintiffs' claimed "that the INS had singled them out for selective enforcement of the immigration laws based on the impermissible motive of retaliation for constitutionally protected associational activity." *American-Arab Anti-Discrimination Committee v. Reno*, 70 F. 3d 1045, 1054 (CA9 1995) ("*American-Arab I*").

The section 1251(a)(6) charges were subsequently dropped. However, additional charges were alleged against Hamide and Shehadeh, the two permanent resident aliens. Pet. for Cert. 4. The INS "brought new charges against them under 8 U. S. C. § 1251(a)(6)(f)(iii), alleging that they were deportable as members of an organization that advocates or teaches the unlawful destruction of property. Later, the INS added a charge under 8 U. S. C. § 1251(a)(6)(f)(ii), alleging that Hamide and Shehadeh were associated with a group that advocates the unlawful assaulting or killing of government officers." *American-Arab I*, 70 F. 3d, at 1253.

The District Court eventually issued a preliminary injunction enjoining the INS from conducting proceedings against the six aliens charged with routine status violations. See *American-Arab I*, 70 F. 3d, at 1054. The District Court, finding it lacked jurisdiction over Hamide and Shehadeh's claims, granted summary judgment to the government as to those claims. Pet. for Cert. 5. The Court of Appeals in *American-Arab I*, however, decided that the federal courts had jurisdiction to review Hamide and Shehadeh's selective enforcement claims. *American-Arab I*, 70 F. 3d, at 1071. The District Court then stayed the proceeding against Hamide and Shehadeh and upheld the injunction of the proceedings against the other six plaintiffs. *American-Arab II*, 119 F. 3d, at 1370; see Pet. for Cert. 5-8 (detailed description of these federal court decisions).

The government appealed the "district court's decision refusing to dissolve the existing preliminary injunction and granting the injunction in favor of Hamide and Shehadeh." *American-Arab II*, 119 F. 3d, at 1370. While the appeal was

pending, the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") was enacted. Pet. for Cert. 9. The government then filed motions to dismiss based on the fact that 8 U. S. C. § 1252(g) as enacted by the IIRIRA deprives the federal court of jurisdiction over the aliens' claims. *American-Arab II*, 119 F. 3d, at 1371.

The Court of Appeals in *American-Arab II* agreed with the government that section 1252(g) applies retroactively but concluded that the section does not eliminate federal court jurisdiction over the plaintiffs' claims. *Id.*, at 1372. The Court of Appeals concluded that application of section 1252(g) would raise " 'serious constitutional question[s] . . . if [it] were construed to deny any judicial forum for a colorable constitutional claim.' " *Ibid.* (quoting *Webster v. Doe*, 486 U. S. 592, 603 (1988)) (internal quotation marks and citations omitted). To correct this perceived denial of meaningful judicial review, the court construed section 1252(f) to preserve the federal court's jurisdiction and held that it was "incorporated" in the retroactive subdivision (g). *Id.*, at 1373. The Court of Appeals also reaffirmed its holding in *American-Arab I* that "prompt judicial review of the Plaintiffs' claims was required because violation of Plaintiffs' First Amendment interests would amount to irreparable injury that 'cannot be vindicated by post-deprivation remedies.' " *Id.*, at 1374 (quoting, with original emphasis, *American-Arab I*, *supra*, 70 F. 3d, at 1057).

The Court of Appeals then affirmed the District Court's decision to issue the preliminary injunction to Hamide and Shehadeh and to affirm the injunction issued to the other six aliens. Pet. for Cert. 10. The court also denied the government's request for rehearing en banc. Pet. for Cert. 11. The government then sought a writ of certiorari from this Court. Certiorari was granted on June 1, 1998, limited to the jurisdictional question.

SUMMARY OF ARGUMENT

The Court of Appeals' interpretation of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") is contrary to the clear intent of Congress to consolidate all litigation of deportation into the statutory review procedure of 8 U. S. C. § 1252. The Court of Appeals read 8 U. S. C. § 1252(b)(4)(A) and its predecessor, 8 U. S. C. former § 1105a(a)(4), in isolation to preclude transfer under 28 U. S. C. § 2347(b)(3) to the district court. These provisions should not be read in isolation.

Considering the section as a whole and the principle of *INS v. Chadha*, 462 U. S. 919 (1983), *amicus* submits that the requirement that the petition be decided only on the administrative record should be limited to those claims which the alien could present to the agency. Under this understanding, 28 U. S. C. § 2347(b) remains available and permits meaningful review of all claims. Congress intended that review of the final order be the complete and exclusive remedy. *Amicus'* interpretation of the IIRIRA will allow this intent to be realized.

ARGUMENT

I. The underlying claims are cognizable on review of the final order of deportation under both prior and current law.

A. Overview.

The Immigration and Nationality Act ("INA") establishes the procedures for the deportation of aliens in this country. See generally 8 U. S. C. § 1101 *et seq.* The Act also constructed a comprehensive administrative and judicial review scheme for the review of deportation proceedings.

"In general, removal determinations are initially made by immigration judges, and are appealable to the BIA [Board of Immigration Appeals]. The BIA, in turn, renders the final administrative decision with regard to all matters

relating to removal proceedings, including eligibility for relief from removal, detention, and parole and bond determinations." A. Fragomen & S. Bell, *Immigration Fundamentals—A Guide to Law and Practice*, ch. 8.1, p. 8-1 (4th ed. 1997).

Upon completion of this administrative review process, the Act then permits review of the final order of deportation in the court of appeals. 8 U. S. C. former § 1105a; § 1252.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") has recently amended the INA. The IIRIRA, which was enacted as part of the Omnibus Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009-575, repeals the prior judicial review statute, 8 U. S. C. § 1105a, and replaces it with 8 U. S. C. § 1252. Subdivision (g) of the new section 1252 explicitly limits the jurisdiction of the federal courts. The Court of Appeals believed that application of this provision according to its plain meaning would prevent the plaintiffs in the present case from receiving meaningful review of their selective enforcement claims. Properly understood, however, the INA's administrative and judicial review scheme, both before and after the amendments, provides for complete review of all claims upon the issuance of the final order of deportation.

B. Effective Date.

Part of the Court of Appeals' interpretive difficulty stemmed from the differing effective dates of the subdivisions of 8 U. S. C. § 1252. See *American-Arab Anti-Discrimination Committee v. Reno*, 119 F. 3d 1367, 1372 (CA9 1997) ("*American-Arab II*"). Subdivision (g) of that section, titled "Exclusive jurisdiction," provides:

"Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to

commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

Congress instructed that the subsection should apply immediately. Section 306(c)(1) of the IIRIRA states that:

"subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection(a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act." Pub. L. No. 104-302, 110 Stat. 3009-612.

The rest of the act, however, does not apply until April 1, 1997, see Pub. L. No. 104-208, § 309(a), 110 Stat. 3009-625 (1997),² and cases pending on the effective date are "grandfathered." See *infra*, at 8.

If the term "this section" in subdivision (g) was applied literally, and if the effective date provisions are applied as written, illogical results would follow. If the remedies in subdivisions (a) through (f) of section 1252 are the only remedies, but those subdivisions do not apply to cases pending when IIRIRA was enacted, then there would be no judicial review for those cases. The Court of Appeals chose to break the second horn of this dilemma, disregarding the plain language of Congress' effective date mandate, and "incorporating" other subdivisions of section 1252 into the "retroactive" subdivision (g). There is a simpler solution that does less violence to the statutory language: break the first horn of the dilemma. *Amicus* submits that the term "this section" in subdivision (g) should be understood to refer to whichever judicial review section governs the proceeding in question, whether it be present section 1252 or its predecessor, former section 1105a.

2. Section 309(a): IN GENERAL. —Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the enactment of the Act (in this title referred to as the "title III-A effective date").

The present case is a "transitional case." Section 309(c)(1) of the IIRIRA provides:

"... in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date—

"(A) the amendments made by this subtitle shall not apply, and

"(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments."³

Deportation proceedings were begun against the plaintiffs in January 1987. *American-Arab II*, *supra*, 119 F. 3d, at 1370. Soon after, the plaintiffs filed in the district court a federal action contesting "the deportation proceeding on First Amendment grounds." *Ibid.* Since that time, the First Amendment claim and the appropriateness of the various courts' jurisdiction have been extensively litigated. See *American-Arab Anti-Discrimination Committee v. Reno*, 70 F. 3d 1045, 1066 (CA9 1995) ("*American-Arab I*"). Technically, then, the deportation proceedings are still pending. This case is governed by 8 U. S. C. former § 1105a, as modified by IIRIRA § 309(c)(4). As discussed further in part II, *infra*, 8 U. S. C. § 1252(g) makes those review procedures exclusive.

C. Cognizable Claims.

The aliens' ability to litigate their claims on review of the final order of deportation follows from the principles in *INS v. Chadha*, 462 U. S. 919 (1983). In that case, Chadha's constitutional challenge to the congressional veto was beyond the administrative agency's authority. Hearings had been conducted and an immigration judge had suspended Chadha's deportation. *Id.*, at 923-924. A report of the suspension was forwarded to Congress, as it had the power to veto the determi-

nation under section 244(c)(2) of the INA. *Id.*, at 924-925. Congress ultimately vetoed the suspension, and the immigration judge reopened the deportation proceedings. *Id.*, at 928. Chadha challenged the constitutionality of section 244(c)(2). *Ibid.* However, the immigration judge ruled that he had no authority to reach this question. *Ibid.* On appeal to the Board of Immigration Appeals ("BIA"), Chadha again challenged section 244(c)(2). Like the immigration judge in the prior proceeding, the BIA also held it was without authority to rule on the constitutionality of an act of Congress. *Ibid.*

Pursuant to 8 U. S. C. former § 1105a(a), Chadha sought review in the Court of Appeals, where his constitutional challenge was resolved. *Chadha*, 462 U. S., at 928. Both Houses of Congress appearing as *amicus curiae* challenged the Court of Appeals' jurisdiction over Chadha's claim. *Id.*, at 937. *Amicus* claimed that "the one-House veto authorized by § 244(c)(2) takes place outside of the administrative proceedings," and therefore is not encompassed in section 1105a's grant of jurisdiction. *Ibid.* Although past authority could be interpreted as requiring a direct attack on the deportation order, the Court did not accept this argument. *Id.*, at 937-938. The Court recognized that "Chadha's deportation stands or falls on the validity of the challenged veto." *Id.*, at 938. The Court then concluded that a final order of deportation " 'includes *all matters* on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing.' " *Id.*, at 937 (emphasis added).

Resolution of the *American-Arab* plaintiffs' selective enforcement claim will determine whether the plaintiffs can be removed from the United States. Like Chadha's claim, plaintiffs' deportation "stands or falls" on the validity of the claim. The final order of deportation is thus contingent on the resolution of the challenge and, accordingly, is encompassed in both section 1252 and former section 1105a's judicial review schemes.

3. Paragraphs (2), (3), and (4) provide the Attorney General with options to apply the new act and for modifications to the old section.

The majority of claims affecting an order of deportation can be resolved in the administrative review process under former section 1105a or section 1252. However, as this Court has counseled, “[c]onstitutional questions obviously are unsuited to resolution in administrative hearing procedures” *Califano v. Sanders*, 430 U. S. 99, 109 (1977). Under *Chadha*, the Court of Appeals, on review of the deportation order, has jurisdiction over all matters that effect the validity of the final order of deportation, regardless of whether the BIA could or did consider them.

Both former section 1105a and section 1252 incorporate the procedures of chapter 158 of title 28. In that chapter, 28 U. S. C. § 2347 establishes a mechanism for review of claims not addressed during the administrative review process. Section 2347(b) provides:

“When the agency has not held a hearing before taking the action of which review is sought by the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

“(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

“(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

“(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented.”

The section requires the Court of Appeals to first determine “whether a hearing is required by law.” 28 U. S. C. § 2347(b). This determination directs where the court will remand the case for additional factfinding. When an agency has failed to

properly develop the record for an issue that it is required to hear, the court can remand the case to the agency for correction of this error. § 2347(b)(1). When an agency is not required to conduct a hearing and “a genuine issue of material fact” is raised, the Court of Appeals can then turn to the district court for additional factfinding. § 2347(b)(3). To implement the *Chadha* principle, this section must be understood as applying separately to the various claims. That is, when the agency cannot consider a constitutional attack, an administrative hearing is not “required by law” as to that claim and district court factfinding is appropriate.

“An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.” 8 U. S. C. § 1229a(a)(1). These proceedings will normally focus on the violations charged. In the present case, the majority of the violations that have been charged are routine status violations. 8 U. S. C. §§ 1251(a)(2) and 1251(a)(9). For example, the plaintiffs have been charged with violations of 8 U. S. C. § 1251(a)(2) for overstaying their visas. *American-Arab I, supra*, 70 F. 3d, at 1055. The hearing that is required to be conducted for the resolution of this claim will focus on the visa and evidence that the individuals overstayed its length. If the proceedings before the immigration judge and the appeal to the BIA fail to develop a record sufficient to establish the validity of the visa violations, then the Court of Appeals would be required to remand the case to the BIA for further development of these facts.

However, because *INS v. Chadha* has developed such a broad definition of review of final orders, some questions will be beyond the agency’s authority. For example, the proceedings for the six aliens charged with status violations will focus on the actual violations as it is these charges that decide if the aliens are deportable. Finding the facts underlying the selective enforcement claim, however, is not necessary for the resolution of these violations, and therefore, the agency is not required by law to hold a hearing to find these facts. It is this situation that section 2347(b)(3) anticipated. -If the administrative review

process has failed to develop "a genuine issue of material fact" that affects the final order of deportation, the district court can then conduct additional factfinding.

The Court of Appeals rejected the argument that transfer to the district court was available. It believed that 8 U. S. C. § 1252(b)(4)(A) and its predecessor, 8 U. S. C. former § 1105a(a)(4), precluded such a transfer. The new section provides that the Court of Appeals "shall decide the petition only on the administrative record . . ." with exceptions not applicable here, and the former section is substantially the same.

To be sure, both the former and present provisions, read in isolation, would seem to have the meaning the Court of Appeals gives them. Yet these provisions must be read in light of the section as a whole and the *Chadha* principle. Congress unambiguously required "all questions of law and fact" to be litigated "in judicial review of a final order under" section 1252. 8 U. S. C. § 1252(b)(9). Congress thought exclusivity of the remedy was so important that it made subsection (g) alone applicable to pending cases. IIRIRA § 306(c)(1). When combined with the presumption that all claims must be reviewable at some point, see *infra*, at 18, these provisions indicate strongly that all claims against deportation should be cognizable on review of the final order.

In light of these considerations, the requirement that the petition be decided only on the administrative record should be understood as limited to those claims which the alien could present to the agency. For other claims, section 2347(b) remains available. This interpretation is reinforced by 8 U. S. C. § 1252(a)(1), which specifically forbids use of subdivision (c) of section 2347. If Congress had intended to forbid invocation of both subdivisions (b) and (c), it would have been simple enough to say so. The omission of (b) while forbidding (c) implies that (b) remains available.

Congress intended that review of the final order be the complete and exclusive remedy. The interpretation of section 1252 that *amicus* proposes, while admittedly a bit of a stretch,

does far less violence to the overall statutory language than the Court of Appeals' contortion.

II. Review of the final order of deportation is the exclusive remedy.

A. Statute's Language and Structure.

For cases commencing after April 1, 1997, the exclusivity of the statutory remedy is explicit:

"(9) Consolidation of Issues for Judicial Review.—Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this title shall be available only in judicial review of a final order under this section." 8 U. S. C. § 1252(b)(9).

While other sections of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") may be less than exemplars of draftsmanship, this one is crystal clear. It is difficult to see how Congress could have stated exclusivity more clearly. A construction of the IIRIRA to provide other channels of review when review of a final order is available,⁴ as the Ninth Circuit construed subsection (f) in the present case, *American-Arab Anti-Discrimination Committee v. Reno*, 119 F. 3d 1367, 1372 (CA9 1997) ("*American-Arab II*"), would be contrary to the unmistakable language of subsection (b)(9).

Review of the final order as the exclusive remedy comports with Congress' intent to streamline the deportation process by

4. The question of availability of habeas corpus when review of the final order is precluded by section 1252(a)(2), see, e.g., *Jean-Baptiste v. Reno*, No. 97-6062 (CA2 May 8, 1998), is not presented by the present case and need not be considered.

precluding initial judicial review⁵ and provides for meaningful review of all claims. Sections 1105a and 1252 were enacted to preclude initial judicial review and to allow for the completion of the INA's administrative review process. To reach this objective, Congress limited the judicial system's jurisdiction to review of final deportation orders only. Section 1252(g) was enacted to reinforce this preclusion of jurisdiction.

Thunder Basin Coal Co. v. Reich, 510 U. S. 200, 207 (1994) illustrates the appropriate analysis to review statutory schemes that limit initial judicial review. In *Thunder Basin*, this Court was asked to analyze the Mines Act's judicial review scheme. *Id.*, at 206. The Mines Act gave the Secretary of Labor the authority to enforce compliance with the Act's provisions through civil penalties and other sanctions. *Id.*, at 204. Individuals could challenge the Secretary's enforcement of the Act by seeking review with the Mine Safety and Health Commission ("MSHC"). *Ibid.* In addition, 30 U. S. C. § 816(a)(1) of the act granted exclusive jurisdiction to the Court of Appeals to review challenges to MSHC decisions. *Id.*, at 208.

The *Thunder Basin* petitioner, however, sidestepped the administrative scheme and made a preemptive strike. Before the Secretary of Labor even attempted to enforce sanctions for Thunder Basin's violation of 30 CFR § 40.4, the petitioners filed suit in the federal District Court to prevent the enforcement. *Id.*, at 204-205. The petitioner's employees, pursuant to the requirements of section 813(f) of the Mine Act, had appointed two employees of the United Mine Workers of America Union, who were not employees of the mine, to serve as their representatives. *Ibid.* Thunder Basin claimed that the designation of these non-employee union representatives violated the principles of collective-bargaining representation

5. "Initial judicial review" refers to review conducted before the administrative remedies are exhausted.

under the National Labor Relations Act. *Id.*, at 205. Thunder Basin alleged that requiring it to make the challenge

"through the statutory-review process would violate the Due Process Clause of the Fifth Amendment, since the company would be forced to choose between violating the Act and incurring possible escalating daily penalties, or, on the other hand, complying with the designations and suffering irreparable harm." *Ibid.* (footnote omitted).

The Court of Appeals for the Tenth Circuit concluded that the district court lacked jurisdiction over the petitioner's claims, and this Court agreed. *Id.*, at 205, 218.

Although the presumption normally favors constructions that allow judicial review of administrative proceedings, 1 R. Rotunda & J. Nowak, *Treatise on Constitutional Law* § 2.11, p. 132, n. 23 (2d ed. 1992), this presumption was overcome in *Thunder Basin* because Congress' intent to preclude initial judicial review was "fairly discernible in the statutory scheme." *Block v. Community Nutrition Institute*, 467 U. S. 340, 351 (1984) (quoting *Data Processing Service v. Camp*, 397 U. S. 150, 157 (1970)); see *Thunder Basin, supra*, 510 U. S., at 207.

The Court instructed that

"[w]hether a statute is intended to preclude initial judicial review [should be] determined from the statute's language, structure, and purpose, its legislative history, *Block*, 467 U. S., at 345, and whether the claims can be afforded meaningful review. See, e.g., *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U. S. 32 (1991); *Whitney Bank v. New Orleans Bank*, 379 U. S. 411 (1965)." *Thunder Basin*, 510 U. S., at 207.

Under this analysis, Congress' intent to limit judicial review to final orders of deportation only is apparent.

The INA's statutory scheme as a whole supports the conclusion that Congress intended to preclude initial judicial review. See *Block, supra*, 467 U. S., at 349. Congress has set

up a system of administrative and judicial review that is comprehensive. See generally 8 U. S. C. former §1105a; §1252. The system provides mechanisms for review of all claims insuring that judicial review will not be completely denied, see, e.g., 28 U. S. C. §2347(b)(3), and explicitly designates the appropriate courts for such review. Development of such a comprehensive administrative and judicial review scheme suggests that Congress intended to limit review to final orders of deportation. If sections 1105a and 1252's procedures are not applied to the *American-Arab* petitioners' claim, this comprehensive system has no real authority over the efficient resolution of immigration matters.

B. Purpose and History.

Congress' intent to preclude initial judicial review can also be "inferred . . . from the collective import of legislative and judicial history behind a particular statute." *Block, supra*, 467 U. S., at 349. When Congress enacted 8 U. S. C. §1105a in 1961, it intended to limit judicial review to final orders of deportation. Soon after section 1105a was enacted, this Court had occasion to interpret the provision and address the purpose behind the new legislation. *Foti v. Immigration and Naturalization Service*, 375 U. S. 217 (1963). The Court explained that the

"fundamental purpose behind section 106(a) [codified as 8 U. S. C. §1105a] was to abbreviate the process of judicial review of deportation orders in order to frustrate certain practices which had come to the attention of Congress, whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts." *Id.*, at 224.

To prevent attorneys from exploiting the judicial review process and delaying the enforcement of the INA deportation provision, Congress eliminated "the previous initial step in obtaining judicial review—a suit in a District Court— . . ." and limited review to the statute's provisions. *Id.*, at 225.

Since 1961, the INA has been modified a number of times. A. Fragomen & S. Bell, *Immigration Fundamentals—A Guide to Law and Practice*, ch. 1.3, p. 1-5 (4th ed. 1997) (listing amendments to the INA). The goal behind each amendment to the INA has always been to develop "an immigration policy that is both *fair* and *effective* . . ." S. Rep. No. 249, 104th Cong., 2d. Sess., 7 (1996) (emphasis added); see also S. Rep. No. 48, 104th Cong., 1st Sess., 1, 3 (1995) (describing how the immigration system is in disarray and needs to be simplified as applied to criminal aliens in order to be effective); Fragomen & Bell, *supra*, at 1-6 (explaining that the Immigration Reform and Control Act of 1986 stemmed from an attempt by Congress to "regain control of its border while upholding the traditional American standards of fairness and compassion . . .").

Of particular concern recently has been insuring the enforcement of the INA's provisions. S. Rep. No. 249, at 7. A report on the Immigration Control and Financial Responsibility Act of 1996 explained:

"Some Americans appear to be ambivalent about the enforcement of the Immigration and Nationality Act. This includes a number of judges, perhaps reflecting a tension they feel between their duty to apply the law and their inclination to be humane toward those seeking a better life in this country . . ." *Ibid.*

To correct this ambivalence and to achieve a fair and effective procedure for deportation matters, the judiciary committee realized that Congress needed to be explicit regarding its objectives. *Ibid.* Congress could not have been more explicit with its retroactive application of section 1252(g): "Except as provided in this section and *notwithstanding any other provision of law, no court shall have jurisdiction* . . ." 8 U. S. C. §1252(g) (emphasis added).

C. Meaningful Review.

In *McNary v. Haitian Refugee Center, Inc.*, 498 U. S. 479, 496 (1991), the Court reiterated that the presumption is that Congress intended to allow for meaningful judicial review of administrative proceedings. If review of the final order did not provide meaningful review, there would be a presumption against its exclusivity. Recognizing that this Court would avoid statutory interpretation that results in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims," *id.*, at 497, Congress left 28 U. S. C. § 2347(b)(3) untouched, while it prohibited factfinding pursuant to 28 U. S. C. § 2347(c). See 8 U. S. C. § 1252(a).

As explained in 8 C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* § 104.13[3][a], page 104-177 (rev. ed. 1998) when discussing the IIRIRA revisions, "alternative bases of jurisdiction typically exist . . . [and] it is mistaken to assume that a particular provision of the IIRIRA or the AEDPA terminates all access to the courts simply because a new statute eliminates the traditional route." "Our whole constitutional history shows that Congress generally doesn't intend to violate constitutional rights, and a court ought not readily assume any sudden departure." Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1399 (1953). By leaving section 2347(b)(3) untouched, Congress demonstrated its concern that all meaningful review not be terminated. Congress has ensured the constitutionality of its limitation of jurisdiction to review of final orders of deportations.

Even though the doctrine of exhaustion of administrative remedies delays application of section 2347(b)(3), the petitioners will receive adequate and meaningful review of their claims. The remedy provided by the court of appeals' post-administrative review combined with section 2347(b)(3)'s additional factfinding when necessary, is an adequate and effective means "to test the validity of the order." See 8 U. S. C. § 1252(d); 8 U. S. C. former § 1105a(c). This Court has found judicial

review schemes that similarly delay review until exhaustion of administrative remedies to be adequate and effective. *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U. S. 32, 43-44 (1991).

In *Board of Governors*, this Court reviewed "the judicial review provisions of the Financial Institutions Supervisory Act of 1966." *Id.*, at 36. The act gave the Board of Governors of the Federal Reserve System ("Board") "substantial regulatory power over bank holding companies and establishe[d] a comprehensive scheme of judicial review of Board actions . . ." *Id.*, at 37. The specific provision at issue in the litigation was 12 U. S. C. § 1818(i)(1) which "precluded judicial review of many Board actions . . ." *Board of Governors*, 502 U. S., at 42. MCorp claimed that notwithstanding the statutes' explicit preclusions of jurisdiction, the district court had jurisdiction to issue an injunction pursuant to specific sections of the bankruptcy code and the judicial code. *Id.*, at 39.

This Court held that section 1818(i)(1) precluded such injunctions. *Id.*, at 42-44. The Court primarily relied on the fact that "FISA expressly provides MCorp with a meaningful and adequate opportunity for judicial review . . ." *Id.*, at 43. MCorp was challenging the "validity of the source of strength regulation." *Ibid.* The Court concluded that this regulation could be reviewed in the Court of Appeals *after* the Board concluded that MCorp had violated the regulation. *Id.*, at 43-44. Although finishing the Board proceedings would delay MCorp's judicial review, the Court concluded the review was adequate.

In the present case, we are faced with a procedurally similar challenge. The aliens subjected to deportation proceedings "have filed a federal suit challenging deportation proceedings on First Amendment grounds before a final order of deportation has been issued." *American-Arab II, supra*, 119 F. 3d, at 1369. Because the immigration statutes require exhaustion of administrative remedies before the Court of Appeals obtains jurisdiction, see 8 U. S. C. former § 1105a(c); § 1252(d), the aliens'

challenge will be delayed until a final order of deportation is issued. Individuals, often with greater rights at stake than in the present case, have their access to federal courts delayed while their administrative or judicial proceedings are completed. For example, state prisoners are typically kept in prison awaiting completion of their state criminal trials and appeals before they seek federal habeas corpus relief, yet this exhaustion is required. 28 U. S. C. § 2254(b)(1). As in *Board of Governors*, this delay does not diminish their ability to obtain meaningful review of their claims.

"A person against whom a deportation proceeding is brought may feel that the proceeding is unjustified and illegal but generally has no right to go to court immediately to stop the proceeding." Gordon, Mailman & Yale-Loehr, *supra*, § 104.02[2], at 104-22. A petitioner will generally only be allowed to forego exhaustion of judicial or administrative remedies if "irreparable injury" would result from the delay. See, e.g., *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 612 (1975).

In *American-Arab Anti-Discrimination Committee v. Reno*, 70 F. 3d 1045 (CA9 1995) ("*American-Arab I*"), the Court of Appeal "held that prompt judicial review of the Plaintiffs' claims was required because violation of Plaintiffs' First Amendment interests would amount to irreparable injury that 'cannot be vindicated by post-deprivation remedies.'" *American-Arab II*, *supra*, 119 F. 3d, at 1374 (quoting, with original emphasis, *American-Arab I*, at 1057). As has been demonstrated, the post-deprivation review provided by former section 1105a and section 1252, along with the factfinding procedures of 28 U. S. C. § 2347(b)(3), are adequate to resolve the plaintiff's selective enforcement claims. Furthermore, "[t]he mere fact that the litigant is subjected to the burden of undergoing the administrative hearing process does not in itself demonstrate the irreparable harm that would justify injunctive relief." Gordon, Mailman & Yale-Loehr, *supra*, § 104.02[2], at 104-24.

American-Arab I claimed "that the perpetual threat of deportation based on group affiliation constitute[d] the kind of irreparable injury" that required federal district court intervention. *American-Arab I*, *supra*, 70 F. 3d, at 1058. Yet issuance of a preliminary injunction would not relieve this threat. A preliminary injunction, even when affirmed on appeal, is not res judicata. See 16B C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4009, p. 157 (2d ed. 1996). Even a permanent injunction can be lifted if the precedent on which it is based is no longer good law. See *Agostini v. Felton*, 138 L. Ed. 2d 391, 409, 117 S. Ct. 1997, 2006 (1997). The preliminary injunction issued in this case, therefore, does not eliminate the threat of deportation. The possibility that the plaintiffs will eventually lose on the merits, and hence the threat of deportation, remains to this day.⁶

The uncertainty can only be resolved by a final judgment in this action or a final order of deportation. The original complaint was filed on April 3, 1987. *American-Arab Anti-Discrimination Committee v. Thornburgh*, 970 F. 2d 501, 505 (CA9 1991). The present case has been litigated for over ten years and still has not prevented this "irreparable injury" the Court of Appeals claims needs federal court intervention. Had the courts stayed on course, the process would have been much simpler: two administrative hearings, a court of appeal review and, if necessary, additional factfinding in the district court. See *supra*, at 5-13. Indeed, the plaintiffs' selective enforcement claims would likely have been resolved by now. The uncer-

6. As noted earlier, plaintiffs support an organization that has declared the United States its enemy and murdered American citizens. See *supra*, at 2. Their "disparate impact" evidence consisted of a showing that people supporting opponents of the now-defunct Communist regimes in Afghanistan and Nicaragua, which were Cold War enemies of the United States, were not deported. *American-Arab II*, 119 F. 3d, at 1375-1376. By holding that this made a case, the District Court held, in effect, that the Constitution requires the United States, in the conduct of its foreign affairs, to treat its enemies equally with its allies. Any rational person would conclude that the possibility of this decision eventually being reversed is substantial.

tainty which is supposedly injuring First Amendment rights has been extended, not eliminated, by the Ninth Circuit's failure to adhere to the INA's provisions.

"Congress' intent in adopting and then amending the INA was to expedite both the initiation and the completion of the judicial review process." *Stone v. INS*, 514 U. S. 386, 400 (1995). The doctrine of exhaustion of administrative remedies' "underlying aim is to prevent harassing interruptions of the administrative process and to avoid unnecessary or repetitious court reviews." Gordon, Mailman & Yale-Loehr, *supra*, § 104.02[2], at 104-26. In the present case, if the doctrine had been followed we would have avoided a decade-long debate over court jurisdiction, and the plaintiffs would have received both meaningful and timely review of their claims. Instead, the final resolution of the selective enforcement claim is still delayed. Since "in a deportation proceeding . . . as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States," *INS v. Doherty*, 502 U. S. 314, 323 (1992), this may not cause the plaintiffs lasting injury.

However, "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *McKart v. United States*, 395 U. S. 185, 195 (1969). Congress recognized this principle when it reaffirmed the appropriate limits on federal courts' jurisdiction. See discussion of 8 U. S. C. § 1252(g), *supra*, at 17. It is now time for this Court to allow the INA's administrative and judicial review to proceed as designed.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed and the case remanded with directions to dismiss for lack of subject-matter jurisdiction.

July, 1998

Respectfully submitted,

KENT S. SCHEIDEGGER*
CHRISTINE M. MURPHY

*Attorneys for Amicus Curiae
Criminal Justice Legal Foundation*

*Attorney of Record

FILED

SEP 11 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

JANET RENO, ATTORNEY GENERAL, *et al.*,
v. *Petitioners,*

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN IMMIGRATION LAW
FOUNDATION, THE AMERICAN IMMIGRATION
LAWYERS ASSOCIATION, THE FLORIDA IMMIGRANT
ADVOCACY CENTER, THE IMMIGRATION AND
REFUGEE SERVICES OF AMERICA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS OF THE
SAN FRANCISCO BAY AREA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF
TEXAS, THE MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, THE MIDWEST
IMMIGRANT RIGHTS CENTER, THE NATIONAL
COALITION TO PROTECT POLITICAL FREEDOM,
AND THE NATIONAL COUNCIL OF LA RAZA
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

NADINE K. WETTSTEIN
AMERICAN IMMIGRATION LAW
FOUNDATION
1400 Eye Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 216-2400

IRA J. KURZBAN
Counsel of Record
PETER HOFER
KURZBAN, KURZBAN,
WEINGER & TETZELI
2650 SW 27th Avenue
Miami, FL 33133
(305) 444-0060

Attorneys for Amici Curiae

QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain Respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI CURIAE	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. ANY CONFLICT BETWEEN PROVISIONS OF IIRIRA MUST BE RESOLVED TO PRO- VIDE JUDICIAL REVIEW FOR ALIENS WHO WERE IN DEPORTATION PROCEED- INGS PRIOR TO IIRIRA'S EFFECTIVE DATE	8
II. COURTS TRADITIONALLY HAVE RECOG- NIZED EXCEPTIONS TO SECTION 1105a THAT ALLOW DISTRICT COURT REVIEW OF DEPORTATION PROCEEDINGS	16
III. BY ITS VERY TERMS, SECTION 2347(b) APPLIES ONLY WHERE NO AGENCY HEARING HAS BEEN HELD	24
IV. ALTHOUGH RESPONDENTS COULD NOT CHALLENGE THIS SELECTIVE ENFORCE- MENT OF DEPORTATION PROCEEDINGS, MANY CONSTITUTIONAL CLAIMS MAY BE PRESENTED TO THE IMMIGRATION JUDGE AND THE BOARD OF IMMIGRA- TION APPEALS	28
CONCLUSION	29

TABLE OF AUTHORITIES

CASES	Page
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	9
<i>Abedi-Tajrishi v. INS</i> , 752 F.2d 441 (9th Cir. 1985)	19
<i>Akrap v. INS</i> , 966 F.2d 267 (7th Cir. 1992)	19
<i>Ali v. INS</i> , 661 F. Supp. 1234 (D. Mass. 1986)	19, 22
<i>Alleyne v. INS</i> , 879 F.2d 1177 (3d Cir. 1989)	28
<i>American-Arab Anti-Discrimination Committee v. Reno</i> , 119 F.3d 1367 (9th Cir. 1997)	27
<i>American-Arab Anti-Discrimination Committee v. Reno</i> , 70 F.3d 145 (9th Cir. 1995)	27
<i>Baria v. Reno</i> , 94 F.3d 1335 (9th Cir. 1996)	18
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	9
<i>Belcher v. Stengel</i> , 429 U.S. 118 (1976)	17
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986)	9
<i>Butros v. INS</i> , 804 F. Supp. 1336 (D. Ore. 1991) ..	19
<i>Campos v. Nail</i> , 940 F.2d 495 (9th Cir. 1991)	22
<i>Cheng Fan Kwok v. INS</i> , 392 U.S. 206 (1968)	6, 13, 18, 19, 29
<i>Commissioner of Internal Revenue v. Asphalt Products Co.</i> , 482 U.S. 117 (1987)	15
<i>Coriolan v. INS</i> , 559 F.2d 993 (5th Cir. 1977)	27
<i>Demarest v. Manspeaker</i> , 498 U.S. 184 (1991)	7, 14, 25
<i>Dunlap v. Bachowski</i> , 421 U.S. 560 (1975)	9
<i>El Rescate Legal Serv. v. Executive Office for Immigration Review</i> , 959 F.2d 742 (9th Cir. 1991)	22
<i>Estep v. United States</i> , 327 U.S. 114 (1946)	10
<i>Exportal Ltda v. U.S.A.</i> , 902 F.2d 45 (D.C. Cir. 1990)	26
<i>Florida Power and Light Co. v. Lorion</i> , 470 U.S. 729 (1985)	8, 25
<i>Foti v. INS</i> , 375 U.S. 217 (1978)	21
<i>Gando-Coello v. INS</i> , 857 F.2d 25 (1988)	19
<i>Ghaelian v. INS</i> , 717 F.2d 950 (6th Cir. 1983)	19
<i>Ghorbani v. INS</i> , 686 F.2d 784 (9th Cir. 1982)	27, 29
<i>Gonzalez-Julio v. INS</i> , 34 F.3d 820 (1994)	28
<i>Gonzalez-Rivera v. INS</i> , 22 F.3d 1441 (9th Cir. 1994)	28

TABLE OF AUTHORITIES—Continued

	Page
<i>Gottesman v. INS</i> , 33 F.3d 383 (4th Cir. 1994)	18
<i>Haitian Refugee Center v. Smith</i> , 676 F.2d 1023 (5th Cir. 1982)	8, 21, 27, 29
<i>Hampton v. Mow Sun Wong</i> , 426 U.S. 88 (1976)	15
<i>Harmon v. Brucker</i> , 355 U.S. 579 (1958)	10
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	18, 19
<i>INS v. Lopez-Mendoza</i> , 468 U.S. 1032 (1984)	28
<i>Jaa v. INS</i> , 779 F.2d 569 (9th Cir. 1986)	19
<i>Jean v. Nelson</i> , 727 F.2d 957 (11th Cir. 1984) (<i>en banc</i>), <i>aff'd as to judgment to remand only</i> , 472 U.S. 846 (1985)	8, 13, 21, 27, 29
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974)	9, 10
<i>Kimbrough v. United States</i> , 364 U.S. 661 (1961) ..	17
<i>Lake Carriers' Ass'n v. U.S.A. (FCC)</i> , 414 F.2d 567 (6th Cir. 1969)	26
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993)	9
<i>Lloyd v. Sabauda Societa v. Elting</i> , 287 U.S. 329 (1932)	10
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	16
<i>Massieu v. Reno</i> , 91 F.3d 416 (3d Cir. 1996)	22
<i>Massieu v. Reno</i> , 915 F. Supp. 681 (D.N.J. 1996) <i>rev'd on other grounds</i> , 91 F.3d 416 (3d Cir. 1996)	23
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	10
<i>McNary v. Haitian Refugee Center</i> , 498 U.S. 479 (1991)	<i>passim</i>
<i>Mohammadi-Motlagh v. INS</i> , 727 F.2d 1450 (9th Cir. 1984)	19
<i>The Monrosa v. Carbon Black Export, Inc.</i> , 359 U.S. 180 (1959)	17
<i>Oestereich v. Selective Service Systems Local Board No. 11</i> , 393 U.S. 233 (1968)	9, 10
<i>Olaniyan v. District Director, INS</i> , 796 F.2d 373 (10th Cir. 1986)	18
<i>Orantes-Hernandez v. Meese</i> , 685 F.Supp. 1488, <i>aff'd sub nom., Orantes-Hernandez v. Thornburgh</i> , 919 F.2d 549 (9th Cir. 1990)	22
<i>Orhorhaghe v. INS</i> , 38 F.3d 488 (9th Cir. 1994)	28

TABLE OF AUTHORITIES—Continued

	Page
<i>Peabody Coal Co. v. Navajo Nation</i> , 75 F.3d 457 (9th Cir. 1996)	15
<i>Radio Relay Corp. v. FCC</i> , 409 F.2d 322 (2d Cir. 1969)	26
<i>Ratzlaf v. United States</i> , 510 U.S. 135 (1994)	14
<i>Reid v. INS</i> , 766 F.2d 113 (3d Cir. 1985)	19
<i>Reynolds v. INS</i> , 846 F.2d 1288 (11th Cir. 1988) ..	19
<i>Shaughnessy v. Pedreiro</i> , 349 U.S. 48 (1955)	10
<i>Tefel v. Reno</i> , 972 F.Supp. 608 (S.D.Fla. 1997)	14, 15, 20, 21
<i>Toolee v. INS</i> , 722 F.2d 1434 (9th Cir. 1983)	19
<i>Traynor v. Turnage</i> , 485 U.S. 535 (1988)	9, 10
<i>United States ex rel. Accardi v. Shaughnessy</i> , 347 U.S. 260 (1954)	14
<i>United States v. Kirkland</i> , 12 F.3d 199 (11th Cir. 1994)	14
<i>United States v. Verdugo-Urquidez</i> , 494 U.S. 259 (1990)	16
<i>Vlassis v. INS</i> , 963 F.2d 547 (2d Cir. 1992)	19
<i>Webster v. Doe</i> , 468 U.S. 592 (1988)	9
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	10
<i>Yi v. Maugens</i> , 24 F.3d 500 (3d Cir. 1994)	23
<i>Young v. United States Dep't of Justice, INS</i> , 759 F.2d 450 (5th Cir. 1985)	19
<i>Zhen Tau Liu v. INS</i> , 55 F.3d 421 (9th Cir. 1995)	8, 28, 29

ADMINISTRATIVE DECISIONS

<i>Matter of N-J-B</i> , Interim Decision No. 3309 (BIA Feb. 20, 1997)	16
<i>Matter of Soriano</i> , Interim Decision No. 3289 (AG Feb. 21, 1996)	16

STATUTES

8 U.S.C. § 1101 (a) (5)	14, 27
8 U.S.C. § 1105a	<i>passim</i>
8 U.S.C. § 1105a (a) (4)	27
8 U.S.C. § 1252 (b)	13
8 U.S.C. § 1252 (f)	12, 13
8 U.S.C. § 1252 (g)	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page
Hobbs Act	
28 U.S.C. § 2347 (b)	7, 24, 25, 27
28 U.S.C. § 2347 (b) (2)	26
28 U.S.C. § 2347 (b) (3)	<i>passim</i>
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009	
§ 306 (c) (1)	5, 11, 12, 13
§ 309 (c)	10, 12, 13
§ 309 (c) (1)	9, 10
§ 309 (c) (2)	5, 11
§ 309 (c) (3)	5
§ 309 (c) (4)	10

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-1252

JANET RENO, ATTORNEY GENERAL, *et al.*,
v. *Petitioners,*

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE AMERICAN IMMIGRATION LAW
FOUNDATION, THE AMERICAN IMMIGRATION
LAWYERS ASSOCIATION, THE FLORIDA IMMIGRANT
ADVOCACY CENTER, THE IMMIGRATION AND
REFUGEE SERVICES OF AMERICA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS OF THE
SAN FRANCISCO BAY AREA, THE LAWYERS
COMMITTEE FOR CIVIL RIGHTS UNDER LAW OF
TEXAS, THE MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, THE MIDWEST
IMMIGRANT RIGHTS CENTER, THE NATIONAL
COALITION TO PROTECT POLITICAL FREEDOM,
AND THE NATIONAL COUNCIL OF LA RAZA
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS¹

¹ This brief is filed with the consent of both Petitioner and Respondents, and letters reflecting those consents have been filed with

INTEREST OF THE AMICI CURIAE

The American Immigration Law Foundation (AILF) is a non-profit public education and advocacy organization whose mission is to increase public understanding of immigration law and policy and the value of immigration to American society. AILF's goals include promoting public service and professional excellence in immigration practice, and advancing fundamental fairness and due process in United States immigration law and its administration. AILF has a direct and serious interest in the development of immigration law, as well as in civil and criminal cases affecting the rights of non-citizens.

The American Immigration Lawyers Association (AILA) is a national non-profit association of immigration and nationality lawyers. AILA is an affiliated organization of the American Bar Association, with more than 5,000 members. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence therein; to promote reforms in the laws with regard thereto; and to facilitate the administration of justice therein.

The Florida Immigrant Advocacy Center (FIAC) is a Florida non-profit legal service organization dedicated to ensuring fair treatment of non-immigrants, immigrants, and refugees through direct legal services and advocacy efforts. FIAC's ability to adequately represent its clients would be drastically undermined by denial of federal court jurisdiction in immigration cases. In case after case in Florida, recourse to federal court has been indispensable in protecting the rights of immigrants.

the Clerk of this Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici* or their counsel, contributed monetarily to the preparation of this brief.

Immigration and Refugee Services of America (IRSA) is a non-profit humanitarian organization that for more than 80 years has addressed the needs and rights of persons in forced or voluntary migration worldwide. IRSA has pursued its mission by advancing fair and humane public policy, facilitating and providing direct professional services, and promoting the full participation of migrants in community life. IRSA has a profound interest in the development of fair and just laws pertaining to the rights of immigrants.

The Lawyers' Committee for Civil Rights of the San Francisco Bay Area (Lawyers Committee) is a civil rights and legal services organization devoted to advancing the rights of people of color, low-income individuals, immigrants and refugees, women, children and other under-represented persons. The Lawyers' Committee is affiliated with the Lawyers' Committee for Civil Rights Under Law in Washington, D.C., which was created at the behest of President Kennedy in 1963. In 1968, the Lawyers' Committee was established by leading members of the private bar in San Francisco.

The Lawyers' Committee for Civil Rights Under Law of Texas, Immigrant and Refugee Rights Project, also is part of the national network of nonpartisan, nonprofit Lawyers' Committees founded in 1963 to provide legal services to victims of discrimination. The Texas Lawyers' Committee, founded in 1991, is committed to attaining and preserving civil rights for immigrants and refugees.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation, advocacy, and education, the civil rights of Latinos living in the United States. The defense of the constitutional rights of immigrants is in the best interests of the Latino community, and MALDEF has taken strong positions in support of immigrants' right through all of its activities.

The Midwest Immigrant Rights Center, a program of Heartland Alliance for Human Needs and Human Rights, has provided legal service to and advocacy on behalf of Chicago area residents since 1888. For over 100 years, the Heartland Alliance has met the needs of Chicago's immigrants and refugees through a broad range of social, educational, legal, health, housing, and employment programs.

The National Coalition to Protect Political Freedom is composed of approximately 30 national and international organizations, including those concerned with civil liberties, law, and human and ethnic rights. The Coalition is a project of the Interreligious Foundation for Community Organizations. The Coalition's goals include supporting the First Amendment rights of both citizens and non-citizens to freedom of speech and political association.

The National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR is the largest constituency-based national Hispanic organization, serving all Hispanic nationality groups in all regions of the country with more than 200 formal affiliates. NCLR conducts immigration policy analysis and advocacy in its role as a civil rights organization.

STATEMENT OF THE CASE

In the interest of brevity, *amici* hereby incorporate by reference the Statement contained in Respondents' brief.

SUMMARY OF ARGUMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") must be interpreted so as to provide judicial review for the claims of aliens who, like Respondents, were in deportation proceedings prior to April 1, 1997, IIRIRA's effective date.

Petitioners admit that their reading of IIRIRA, whereby section 1252(g) is applied independently of the remainder of section 1252, would result in the complete denial of all judicial review for such aliens. Such a result, however, would be contrary to the well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action, and more specifically, review of colorable constitutional claims, and would raise serious constitutional questions.

2. One resolution to the statutory anomaly is to read section 1252(g) as applying to claims arising from deportation proceedings pending on April 1, 1997, only where the Attorney General has invoked the new section 1252 judicial review procedures in their entirety (as she is authorized to elect under section 309(c)(2) and (3)). In other words, section 1252(g) would apply "without limitation" only when the Attorney General has elected to proceed under section 1252. This would give meaning to the opening words of 1252(g), which states that "except as provided in this section . . . no court shall have jurisdiction" to hear claims concerning removal proceedings. If, however, 1252(g) applies independently of the remainder of section 1252, as Petitioners assert, its opening clause is rendered meaningless, and the "exclusive jurisdiction" of section 1252(g) becomes "no jurisdiction" for aliens in deportation proceedings before April 1, 1997. Again, this result is contrary to well-settled law and leads to an unconstitutional result.

3. Another resolution is for aliens in deportation proceedings before April 1, 1997 to obtain judicial review of their claims pursuant to the former Section 106 of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. section 1105a (1994)). Petitioners themselves concede that this is the proper resolution to the "textual anomaly" presented by section 306(c)(1) and section 309(c). While Petitioners claim that section 1105a limits jurisdiction to appellate review of final orders of deportation, exceptions to this general proposition long have been

recognized so as to avoid the delay and procedural redundancy that Congress sought to eliminate by enacting section 1105a.

4. The plain statutory language of section 1252(g) provides another resolution to the conflict at issue, for section 1252(g) only precludes judicial review of "the decision or action of the Attorney General," and the term Attorney General is specifically defined in the INA as the "Attorney General of the United States." Section 1252(g), therefore, only restricts judicial review of the specific decisions of the Attorney General, and not lower level governmental officials. This reading is consistent with the principle that while persons at the highest level of government are accorded deference, such deference may not be accorded to lower level officials. If section 1252(g) is read otherwise, then any immigration decision made by any person who works, in any capacity, for the Justice Department would be immune from review. Such a sweeping interpretation should not be presumed from a statute that on its face plainly expresses a contrary intent.

5. Moreover, Petitioners' concession that proper resolution of this case is pursuant to section 1105a, and not the IIRIRA, suggests that certiorari was improvidently granted in this instance. The only question before the Court is whether, in light of the IIRIRA, the courts below had jurisdiction to entertain Respondents' challenge to the deportation proceedings. Since Petitioners now concede that section 1105a properly provides jurisdiction, the grant of certiorari appears improvident.

6. Initial district court review of Respondents' constitutional and statutory claims is proper pursuant to section 1105a. This Court, in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), first recognized an exception to section 1105a allowing district court review of matters collateral to final orders of deportation. Numerous courts have since followed the instructions and logic of *Cheng Fan*

Kwok, allowing initial district court review of constitutional and other claims preliminary to, or not a part of, final orders of deportation. Such review eliminates needless administrative hearings and appeals, and instead provides prompt review of dispositive issues prior to the filing of a final order of deportation.

7. Initial district court review is necessary, for example, to provide meaningful review of class action challenges to deportation proceedings that contain allegations of constitutional and statutory violations. Restricting review to appellate courts, which lack fact-finding and record developing capabilities, would deny thousands of aliens meaningful review of their statutory and constitutional claims. *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991). It also would cause tens of thousands of aliens to present in the administrative process individual claims that could not even be heard in that process, then file individual appeals to the circuit courts, only to have those cases remanded, case-by-case, to the district court for additional fact finding. This procedure, advocated by Petitioners, fosters the very delay and procedural redundancy section 1105a was enacted to eliminate. The reasonable exceptions to section 1105a that allow initial district court review where appellate review is inadequate should not be abandoned now.

8. To bolster its argument and save it from an obvious constitutional deficiency, Petitioners assert that 28 U.S.C. section 2347(b)(3) may permit fact finding of constitutional claims after the entry of a final order of deportation. To reach this result, Petitioners ignore the plain language of section 2347(b), which makes the section applicable only when the agency has not held a hearing and is not required to do so. One also must look in vain in the language of section 2347(b) for Petitioners' assertion that it applies to review "ancillary factual issues." Petitioners' reading therefore violates the plain language of the statute and cannot be adopted. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Not surprisingly,

no court has ever accepted Petitioners' interpretation of section 2347(b)(3). Court decisions demonstrate that it is properly invoked only when the agency has not conducted a hearing. *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 740 (1985).

9. The ability to bring district court actions does not mean that all constitutional claims must be adjudicated in the district courts. Many "administratively correctable procedural errors" may be addressed by the Board of Immigration appeals administratively "even when the errors are failures to follow due process." *Zhen Tau Liu v. Waters*, 55 F.3d 421, 426 (9th Cir. 1995). So while some constitutional questions may be heard administratively, broad-based challenges to INS' patterns and practices, for example, are properly brought in the district court. See, e.g., *McNary, supra*, *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd as to judgment to remand only*, 472 U.S. 846 (1985); *Haitian Refugee Center v. Smith*, 676 F.2d 1023 (5th Cir. 1982). Further, facial constitutional challenges not requiring factual development can be decided initially in the courts of appeals. *Zhen Tau Liu v. Waters*, 55 F.3d 421 (9th Cir. 1995).

ARGUMENT

I. ANY CONFLICT BETWEEN PROVISIONS OF IIRIRA MUST BE RESOLVED TO PROVIDE JUDICIAL REVIEW FOR ALIENS WHO WERE IN DEPORTATION PROCEEDINGS PRIOR TO IIRIRA'S EFFECTIVE DATE

1. Petitioners argue that only one provision of IIRIRA's new judicial review scheme, section 1252(g), applies to aliens in deportation proceedings prior to April 1, 1997. The rest of section 1252, Petitioners acknowledge, does not apply because Congress specified that pending cases were to be governed by pre-IIRIRA judicial review procedures. Petitioners also concede that the result of the application of the new section 1252(g)

to the claims of the thousands of aliens, like Respondents, who were placed in deportation proceedings prior to April 1, 1997 (IIRIRA's effective date) would be the complete denial of *all* judicial review. Such a result, however, is in conflict with section 309(c)(1), which provides that the new amendments shall not apply for aliens who were in deportation proceedings before April 1, 1997, and that the proceedings, including judicial review, shall continue to be conducted without regard to such amendments. The Court must interpret any conflicting provisions of IIRIRA to provide judicial review for the constitutional and statutory claims of these aliens.

An interpretation of the statutory provisions that results in a denial of all judicial review would raise serious constitutional questions, as well as conflict with this Court's "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986); see also *Traynor v. Turnage*, 485 U.S. 535, 542 (1988); *Dunlap v. Bachowski*, 421 U.S. 560, 567 (1975). Judicial review "is the rule, and nonreviewability an exception which must be demonstrated." *Barlow v. Collins*, 397 U.S. 159, 166-67 (1970). The strong presumption favoring judicial review may be overcome "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (citations omitted); accord *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993).

The Court requires this heightened showing that judicial review has been precluded so as to avoid "the 'serious constitutional question' that would arise if a federal statute were to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe*, 468 U.S. 592, 603 (1988); See *Bowen*, 476 U.S. at 681 n.12; *Johnson v. Robison*, 415 U.S. 361, 367-74 (1974); *Oestereich v. Selective Service Systems Local Board No. 11*, 393 U.S.

233, 237-38 (1968). Thus, even where statutes on their face bar judicial review of agency action, this Court has interpreted them to permit review of *constitutional* claims. See, e.g., *Johnson*, 415 U.S. at 367-73 (statute purporting to preclude review over all claims did not affect jurisdiction over constitutional claims); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Oestereich*, 393 U.S. at 237-38; *id.* at 240-43 (Harlan, J., concurring); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958); *Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955); *Estep v. United States*, 327 U.S. 114, 120-23 (1946); *id.* at 128 (Murphy, J., concurring); *Lloyd v. Sabauo Societa v. Elting*, 287 U.S. 329, 334-37 (1932). Moreover, the Court has previously upheld district court review where a finding of preclusion could foreclose all *meaningful* review. See, e.g., *McNary v. Haitian Refugee Center*, 498 U.S. at 496; *Traynor v. Turnage*, 485 U.S. at 542; *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976). In accordance with this Court's jurisprudence favoring judicial review, the statutory provisions in this case must be interpreted so as to provide meaningful judicial review of constitutional claims such as those put forward by Respondents. Any other holding would deprive thousands of aliens of the opportunity to have their colorable claims of constitutional violations by the INS judicially reviewed.

2. Section 309(c) provides that, subject to the "succeeding provisions" (which establish "transitional changes in judicial review" but do not include section 1252(g)), the judicial review "amendments made by this subtitle shall not apply, and the proceedings (including judicial review thereof) shall be conducted without regard to such amendments" for aliens in deportation proceedings prior to April 1, 1997. Section 309(c)(1)(A) and (B). Since section 1252(g) is not included in section 309(c)(4), it does not apply to pending cases.

Section 1252(g), entitled "Exclusive Jurisdiction," states that [e]xcept as provided in this section and not-

withstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act." If, as Petitioners argue, section 1252(g) does apply to aliens with claims pending on April 1, 1997, *independently* from the remainder of section 1252, the opening words, "except as provided in this section" have no meaning and are superfluous.² Moreover, such a reading transforms what was titled "exclusive jurisdiction" into "absolutely no jurisdiction" for the thousands of aliens, like Respondents, who were in deportation proceedings on April 1, 1997. Again, such a result cannot pass constitutional scrutiny.

Section 306(c) provides that section 1252(g) "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." Section 306(c), then, makes section 1252(g) retroactive in scope, and provides that when section 1252 is applied by the Attorney General in its entirety (hence the "except as provided in this section" language in (g)), section 1252(g) will apply without limitation. This reading would apply only when the Attorney General elects to invoke the new judicial review procedures for pending cases, as she is authorized to do pursuant to section 309(c)(2) and (3). In other words, if the Attorney General elects to invoke the judicial review procedures

² Petitioners also argue that section 1252(g)'s language "except as provided in this section" refers not to section 1252 (as the plain language states), but rather to 8 U.S.C. section 1105a. Pet. Br. at 30-31 n.15. Not only is section 1105a not in section 1252 ("this section") but also it was repealed by the IIRIRA. Petitioners argument that section 1105a is somehow the referenced section in section 1252(g) also ignores (g)'s plain language of "notwithstanding any other provision of law." For the plain language of section 1252(g) to have meaning, it must be read in reference to the rest of section 1252.

of section 1252, section 1252(g) applies without limitation; otherwise, section 1252(g) is inapplicable to aliens in deportation proceedings prior to April 1, 1997 (as provided by section 309(c)).

If, however, section 1252(g) is read to apply independently from the rest of section 1252, as Petitioners suggest, the first words of section 1252(g) would be meaningless. The rest of section 1252(g) would raise a serious constitutional question because it then would preclude any and all judicial review for thousands of aliens, and it would fail to reconcile section 306(c) with section 309(c), which expressly provides that none of the judicial review amendments in section 1252 applies to pending cases.

Further, if section 1252(g) is read in conjunction with the rest of section 1252 (as its plain language instructs), the judicial review afforded would be similar to that provided under the former section 1105a. Under this section 1252 scheme, exclusive review of claims that could be adequately addressed on appellate review would be with the court of appeals, while for those claims (such as Respondents') where an appellate court could not provide meaningful review, aliens in deportation proceedings could seek injunctive relief in the district court pursuant 8 U.S.C. section 1252(f).

3. Petitioners, finding themselves caught in this statutory netherworld between section 306(c)(1) and section 309(c), initially argue that "while the rest of new Section 1252 is inapplicable to aliens who (like Respondents) were placed in deportation proceedings before IIRIRA's effective date, Section 1252(g) is immediately available to such aliens" Pet. Br. at 29-30. Petitioners then admit that such an interpretation would deprive Respondents, and thousands of others similarly situated, "of *all* judicial review, even after the entry of a final order." Pet. Br. at n.15. Aware that such a result could not pass constitutional scrutiny, Petitioners finally concede that

"the textual anomaly [between section 306(c)(1) and section 309(c)] is properly resolved by holding that respondents may obtain judicial review . . . pursuant to the provisions of former 8 U.S.C. section 1105a (1994) rather than pursuant to the new Section 1252."³ Pet. Br. at n.15.

Upon conceding the applicability of section 1105a, Petitioners next attempt to strictly limit review under section 1105a to appellate review of final orders of deportation, precluding any district court review of colorable statutory or constitutional claims. In so doing, Petitioners simply ignore the fact that this limitation has long since been rejected. *See, e.g., Cheng Fan Kwok; McNary; Jean v. Nelson*. District court review of matters collateral to final orders of deportation, such as class action challenges to proceedings that require fact finding beyond the scope of administrative review, traditionally has been recognized as an exception to section 1105a's limitation of appellate review of final orders of deportation.

4. Another resolution to this statutory conflict is found in the plain language of section 1252(g), which provides that ". . . no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action *by the Attorney General* to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. section 1252(g) (emphasis added). The Immigration and Nationality Act specifically provides that "[t]he term 'Attorney General' means the Attorney General of the

³ Petitioners' concession that the proper resolution of claims that involve deportation proceedings prior to April 1, 1997 is pursuant to section 1105a renders most of their brief irrelevant. In the end, Petitioners' lengthy discussions of sections 1252(b)(9), 1252(f), and even 1252(g) have no bearing on the outcome of this case.

United States." INA § 101(a)(5), 8 U.S.C. section 1101 (a)(5). No other person or official is mentioned.

In other words, section 1252(g) only precludes judicial review of "the decision or action of the Attorney General" herself, and in Respondents' case, the challenged decision or action was made by lower governmental officials, not by the Attorney General. In this way, section 1252(g) does not apply to this case (or bar judicial review), because the statute does not prohibit judicial review of the decisions or actions of lower level of government officials.

This reading of the plain language of section 1252(g) was approved in *Tefel v. Reno*, 972 F. Supp. 608, 612-16 (S.D. Fla. 1997), which held that the statute did not, on its face, bar the exercise of a district court's federal question jurisdiction. As the court reasoned, a decision by a lower level government official "is not factually, nor legally, the decision of the Attorney General. The Supreme Court recognized in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) that there was a clear separation between the Attorney General and the BIA and that the Attorney General could not, without violating due process, interfere with the deliberative process of the BIA." *Id.* at 613 n.1. In *Tefel*, as in this case, the government failed to present any evidence that the Attorney General herself ordered or directed the specific actions challenged. *Id.*

Such a reading of section 1252(g) also is consistent with the principles governing statutory construction of preclusion statutes. If the statutory language is clear on its face, the inquiry ends and no review of the legislative history or administrative practice is necessary or appropriate. *Ratzlaf v. United States*, 510 U.S. 135, 146 and n.18 (1994); *United States v. Kirkland*, 12 F.3d 199 (11th Cir. 1994); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

Nor would this reading of section 1252(g) lead to an unreasonable result, although even if it did, the plain language still would control. *Tefel*, 972 F. Supp. at 613, citing *Commissioner of Internal Revenue v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987); *Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 468 (9th Cir. 1996). Restricting judicial review solely to the specific decisions of the Attorney General and not to those of lower level government officials also is consistent with the principle that while persons at the highest level of government may be accorded deference, such deference may not be accorded lower level officials. *Tefel*, 972 F. Supp. at 613, citing *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). If the Court were instead to adopt Petitioners' broad reading of section 1252(g), then "any immigration decision of any person who works, in any way, for the Department of Justice would be insulated from review." *Tefel*, 972 F. Supp. at 613. It would be improper to presume such a sweeping interpretation of a statute that on its face expresses an unambiguous contrary intent.

While Petitioners may argue that the term "Attorney General" has been presumed to include the Attorney General's delegates as well, since many immigration statutes specifically name the Attorney General, this argument lacks merit. First, the former INA § 106(a) (codified as 8 U.S.C. section 1105a) expressly did not name the Attorney General.⁴ Second, the mere fact that there has

⁴ Former section 1105(a) reads: "[t]he procedure prescribed by, and all the provisions of chapter 158 of Title 28 shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or pursuant to section 1252a of this title or comparable provision of any prior Act" Compare this language with the new section 1252(g): ". . . no court shall have jurisdiction to hear any cause or claim by or behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter." 8 U.S.C. section 1252(g) (emphasis added).

not been a previous challenge as to this reading of section 1252(g) does not mean that section 1252(g) applies to decisions other than those made by the Attorney General herself. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions . . . and such assumptions—even on jurisdictional issues—are not binding in future cases").

Additionally, while the Attorney General may delegate her authority under the INA to lower level government officials in limited circumstances (*see* INA sections 103(a)(4), (a)(6) and (c)), she cannot determine the extent of federal jurisdiction by delegating her authority, because to do so would be contrary to the fundamental principle that "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

The fact that the Attorney General herself has in the past taken actions or made decisions concerning the removal of aliens supports the interpretation that section 1252(g)'s restriction is limited, as its plain language states, to the decisions or actions of the Attorney General herself. *See, e.g., Matter of N-J-B*, Interim Decision No. 3309 (BIA, Feb. 20, 1997); *Matter of Soriano*, Interim Decision No. 3289 (AG, Feb. 21, 1996).

II. COURTS TRADITIONALLY HAVE RECOGNIZED EXCEPTIONS TO SECTION 1105a THAT ALLOW DISTRICT COURT REVIEW OF DEPORTATION PROCEEDINGS

1. The district court's jurisdiction was proper pursuant to the former 8 U.S.C. section 1105a. As Petitioners themselves ultimately conceded, this case is not properly resolved under the IIRIRA, as judicial review for aliens in deportation proceedings prior to April 1, 1997, is obtained pursuant to section 1105a ("judicial review is avail-

able for such aliens only as provided in 8 U.S.C. section 1105a itself"). Pet. Br. at n.15. Petitioners' concession strongly suggests that certiorari was improvidently granted in this case, for the only question presented on certiorari is "whether, in light of the IIRIRA, the courts below had jurisdiction to entertain Respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation." Since Petitioners themselves now argue that proper resolution of this case would be for Respondents to obtain judicial review pursuant to section 1105a, not the IIRIRA, the grant of certiorari was improvident. *Belcher v. Stengel*, 429 U.S. 118, 119 (1976); *Kimbrough v. United States*, 364 U.S. 661 (1961); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959).

2. Prior to the enactment of IIRIRA, judicial review of deportation proceedings was governed by section 106(a) of the INA, 8 U.S.C. section 1105a (1994).⁵ Although former section 1105a generally limited appellate review to final orders of deportation, exceptions to this general rule traditionally have been recognized to allow district court review of challenges to deportation proceedings that require fact finding beyond the scope of administrative review, or that involve issues that if postponed would foster delay and procedural redundancy (in keeping with the legislative intent behind the passage of section 1105a). This Court first recognized an exception to section 1105a allowing district court review in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968). In *Cheng Fan Kwork*, the Court held that while exclusive review of "final orders of deportation" is in the court of appeals, in situations relating to review of collateral matters, an "alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court." *Id.* at 210. Numerous courts have followed the instructions and logic

⁵ Section 306 of IIRIRA restructured judicial review of deportation orders (renamed "orders of removal"), and repealed section 106 of the INA, 8 U.S.C. section 1105a, in its entirety.

of *Cheng Fan Kwok*, holding that matters collateral to a final order of deportation are properly raised and reviewed under section 1105a in federal district court.⁶ See, e.g., *Baria v. Reno*, 94 F.3d 1335 (9th Cir. 1996) (district court has jurisdiction to hear challenge to rescission order); *Gottesman v. INS*, 33 F.3d 383 (4th Cir. 1994) (decision by district director rescinding LPR status not part of final order under *Chadha*); *Olaniyan v. District Director, INS*, 796 F.2d 373, 376-77 (10th Cir. 1986) ("If the issues do not meet the jurisdictional tests of

⁶ The Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), although cited by Petitioners, did not alter the status of the traditional exceptions under section 1105a that permit district court review. *Chadha* involved an alien who had his suspension of deportation vetoed by the House of Representatives. This Court held that the court of appeals, pursuant to section 1105a, had jurisdiction to consider *Chadha*'s constitutional challenge to the immigration statute, which allowed either house of Congress to veto the Attorney General's suspension of deportation. As the Court reasoned, *Chadha* "directly attack[ed] the deportation order itself, and the relief he [sought]—cancellation of deportation—[was] plainly inconsistent with the deportation order." *Id.* at 939. *Chadha* thus attacked an order that was *already final*, making review in the court of appeals proper. Significantly, *Chadha*'s challenge was to the constitutional validity of the statute, and did not require, as in this case, the development of a factual record for meaningful review.

Additionally, it was necessary for *Chadha* to complete his deportation proceedings *before* he could challenge the House veto, as the veto could not, by its very nature, occur until the end of the proceedings. As such, *Chadha* simply could not have attacked the constitutionality of the statute (or the deportation order) until after the House had vetoed his suspension. Respondents, on the other hand, make constitutional claims that are ripe for review prior to the entry of any final order. Nothing would be gained in this case by further deportation proceedings and administrative appeals, except the very delay and procedural redundancy section 1105a was enacted to eliminate. Unlike *Chadha*, Respondents challenge a decision by the government to selectively target them for deportation, a decision that is clearly distinct from, and preliminary to, a final order of deportation. As such, section 1105a would not permit the court of appeals to review Respondents' constitutional claims; in such instances, jurisdiction for initial review is with the district court.

[section 1105a], we have no authority to review them under the auspices of that section, and exclusive jurisdiction for initial review lies in the district court"); *Jaa v. INS*, 779 F.2d 569, 571 (9th Cir. 1986) (district court has jurisdiction to review determinations "ancillary to an application for permanent residency"); *Young v. United States Dep't of Justice, INS*, 759 F.2d 450, 457 (5th Cir. 1985) (BIA refusals to open bond determinations are not reviewable under section 1105a); *Ghaelian v. INS*, 717 F.2d 950, 952 (6th Cir. 1983) (section 1105 does not grant jurisdiction to review constitutionality of INS regulations that are not central to the deportation decision); *Toole v. INS*, 722 F.2d 1434, 1437 (9th Cir. 1983) (court of appeals lacked jurisdiction to review district director's decision denying an extension of stay, because the decision was not a final order of deportation); *Mohammadi-Motlagh v. INS*, 727 F.2d 1450, 1452 (9th Cir. 1984) (explaining that "*Chadha* . . . does not signify that the Court has retreated from the narrow construction of section 1105a(a) adopted in *Cheng Fan Kwok v. INS*."). See also, *Akrup v. INS*, 966 F.2d 267, 270 (7th Cir. 1992) (denial of stay by BIA not reviewable in the circuit court); *Vlassis v. INS*, 963 F.2d 547 (2nd Cir. 1992) (same); *Reynolds v. INS*, 846 F.2d 1288 (11th Cir. 1988) (same); *Reid v. INS*, 766 F.2d 113 (3d Cir. 1985); *Abedi-Tajrishi v. INS*, 752 F.2d 441 (9th Cir. 1985); *Gando-Coello v. INS*, 857 F.2d 25, 26 (1988); *Butros v. INS*, 804 F. Supp. 1336, 1339 (D. Ore. 1991); *Ali v. INS*, 661 F. Supp. 1234 (D. Mass. 1986) (district court review proper where complaint challenging INS' procedures for handling marriage petitions raises matters collateral to deportation order). This traditional rule of reason, allowing district court review of claims preliminary to, or not a part of, final orders of deportation should not be abandoned now, as it promotes the judicial efficiency which section 1105a sought to provide. Initial district court review obviates the holding of needless administrative hearings and appeals while constitutional or statutory claims lie in abeyance, instead providing review

of possibly dispositive issues prior to the filing of a final order of deportation.

3. The soundness of initial district court review is best illustrated by class action challenges to deportation proceedings that contain allegations of constitutional and statutory violations. In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), this Court held that appellate review of individual cases would mean that "meaningful judicial review of [the] statutory and constitutional claims would be foreclosed." *Id.* at 484. Recognizing that an appellate court lacks the fact finding and record-developing capabilities of a federal district court, the Court stated that "[i]t therefore seems plain to us . . . that restricting judicial review to the courts of appeals as a component of the review of an individual deportation order is the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *Id.* at 497-98. Yet, this is precisely what Petitioners propose: a foreclosure of district court review, with appellate review of individual cases following individual administrative proceedings and administrative appeals. In cases alleging class-wide violations, such a procedure would merely result in needless administrative hearings and appeals (where potentially dispositive claims would go unheard) on a case-by-case basis, followed by appellate review of individual final orders of deportation (which would be devoid of any factual record as to the constitutional or statutory claims), followed by, presumably, a case-by-case remand to the district court for additional fact finding. Such a disruptive procedure would surely frustrate the expressed legislative intent behind the enactment of section 1105a, as it would do nothing more than fill the courts of appeal with thousands of claims that could have been promptly resolved in a single, unified district court action.

This is not merely a hypothetical, doomsday scenario: *Tefel v. Reno*, 972 F.Supp. 623 (S.D.Fla. 1997), which is currently pending before the Eleventh Circuit, involves

a class action challenge to a governmental policy that plaintiffs contend unconstitutionally deprives class members, estimated to be in excess of 40,000 individuals, of their right to seek suspension of deportation in the United States. *Id.* at 626 n.4. As *Tefel* makes clear, if section 1105a no longer permits district court review of class actions, as Petitioners argue, then the result for *Tefel* (and cases like it) would be 40,000 separate, individual appeals brought in the courts of appeal, with the possibility, under Petitioners' rubric, of 40,000 remands to the district court for additional fact finding. And this would be *after* the 40,000 individuals had finished with their administrative hearings and appeals. Obviously, such a result does not eliminate delay and procedural redundancy, but instead actually creates it. With constitutional class-action challenges such as *Tefel* in the pipeline, the most judicious ruling in this case would be to retain the reasonable and traditional exceptions to section 1105a intact.

As the Eleventh Circuit recognized in *Jean v. Nelson*, "postponing conclusive judicial resolution of a disputed issue that affects an entire class of aliens until an individual petitioner has the opportunity to litigate it on habeas corpus would foster the delay and procedural redundancy that Congress sought to eliminate in passing section 1105a." Allegations that immigration officials engaged in practices that violate the constitutional rights of a class of aliens "constitute wrongs which are independently cognizable in the district court under its federal question jurisdiction."⁷ *Haitian Refugee Center*. In hold-

⁷ The court in *Haitian Refugee Center* candidly acknowledged the "surface appeal" of the government's argument, which is the same as Petitioners' here, that *Foti v. INS*, 375 U.S. 217 (1978) and the legislative history of section 1105a barred district court review (and thus would require each class member to raise statutory or constitutional claims individually in the court of appeals). The court, however, persuasively rejected the government's claim, instead recognizing both the benefit to conclusive district court resolu-

ing that the district court had jurisdiction pursuant to an exception to section 1105a, the court drew a distinction between "the authority of a court of appeals to pass upon the merits of an individual deportation order and any action in the deportation proceeding to the extent it may affect the merits determination, on the one hand, and, on the other, the authority of a district court to wield its equitable powers when a wholesale, carefully orchestrated, program of constitutional violations is alleged." *Id.*

McNary, Jean, and Haitian Refugee Center illustrate the sound logic of permitting district court review under section 1105a of constitutional and statutory claims that are not part of a final order of deportation (and that could not be reviewed administratively), and that also require the development of a factual record.⁸ Petitioners, on the other hand, cite only *Massieu v. Reno*, 91 F.3d 416 (3d Cir. 1996), a case in which the Third Circuit held that since *Massieu's* challenge was neither procedural nor collateral, review was proper in the court of appeals. *Massieu* is not helpful to Petitioners, however, because

tion of class-wide statutory and constitutional issues before the entry of a final order, and the senselessness of sending potentially thousands of individual class members to the court of appeals.

⁸ The rationale behind these holdings has been adopted by many courts. See, e.g., *El Rescate Legal Serv. v. Executive Office for Immigration Review*, 959 F.2d 742, 746-47 (9th Cir. 1991) (district court had jurisdiction to review class action alleging pattern and practice of constitutional and statutory violations); *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1503, *aff'd sub nom.*, *Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990) (to require plaintiffs to raise constitutional pattern and practice claims in deportation proceedings "would effectively ensure that some class members would never be able to raise the claims or secure redress"); *Campos v. Nail*, 940 F.2d 495, 497 (9th Cir. 1991) (district court has jurisdiction to review class-action challenge to unconstitutional practices and procedures by immigration judge); *Ali v. INS*, *supra* (district court has jurisdiction to hear constitutional challenge to INS' marriage petition process).

it did not reject the proposition that district courts have jurisdiction under section 1331 to review challenged administrative practices, policies, and procedures when meaningful review in the courts of appeals is precluded for want of a factual record.⁹ *Id.* at 243. As the district court in *Massieu* noted, this was not a case that needed a factual record because the "claims presented 'pure questions of law' for which no agency fact-finding would be required or even marginally illuminating." *Massieu v. Reno*, 915 F. Supp. 681, 694 (D.N.J. 1996), *rev'd on other grounds*, 91 F.3d 416 (3d Cir. 1996). Respondents, on the other hand, present fact-based constitutional claims which require a factual record that can only be developed at the district court.

Further, since Respondents' claims are entirely collateral to the determination of whether they are deportable on the basis of the substantive charges against them, requiring that they first proceed through lengthy deportation hearings and administrative appeals before reaching their constitutional claims would add a meaningless extra layer of review, thereby causing procedural redundancy. If, however, initial district court review is available, and Respondents prevail, unnecessary administrative proceedings and court of appeals review would be avoided.

In short, the traditional exceptions to section 1105a allowing district court review of constitutional and statutory claims, and class actions, which have been guided by rea-

⁹ The court in *Massieu* cited with approval *Yi v. Maugens*, 24 F.3d 500, 506 (3d Cir. 1994), which held that district courts retain their federal question jurisdiction "when the challenged administrative practice, policy or procedure precluded adequate development of the administrative record and consequently meaningful review under the procedures set forth in § 1105 and/or when the challenged practice was collateral and divorced from the substantive aspects underlying the alien's claim." Petitioners' reliance on *Massieu* is therefore misplaced, as the Third Circuit also recognizes an exception to section 1105 that permits district court review of procedural and collateral challenges that require the development of a factual record.

son and the legislative intent behind section 1105a, should be retained.

III. BY ITS VERY TERMS, SECTION 2347(b) APPLIES ONLY WHERE NO AGENCY HEARING HAS BEEN HELD

1. The government asserts that the rarely-used transfer provision of the Hobbs Act, 28 U.S.C. section 2347(b)(3), is available to Respondents for post-final order transfer of their selective enforcement claims to the district court. In doing so, the government distorts the text of section 2347(b) and ignores procedural and contextual obstacles to such an alternative.

First, only a creative reading of section 2347(b)(3) would support the government's contention. On its face, section 2347(b) applies only when the agency has not held a hearing before taking the action of which the petitioner seeks review. The government failed to mention this threshold point in its certiorari petition or in its brief.

By its terms, section 2347(b)(3) does not apply in the context in which the government seeks to use it in this case. That is, the government says that after a final order of deportation, the court of appeals may invoke section 2347(b)(3) to transfer the case to the district court for fact-finding. To state the obvious, if there is a final order of deportation, the INS has held a hearing, and section 2347(b) does not apply. The government concedes that section 2347(b) applies only to issues not required to be resolved by the agency, but does not acknowledge that section 2347(b) applies only if no hearing was held and if the agency is not required to hold a hearing. Pet. Br. at 19.

The government further contends that nothing in the text of the Hobbs Act or the INA renders the transfer mechanism inapplicable to judicial review of final orders of deportation. *Id.* This statement is simplistic and misleading. There is a final deportation order to review only

if there has been a deportation hearing. If there is a final order, by its terms, section 2347(b) does not apply because a hearing has been held.

2. Further, the government says that a "reviewing court may transfer a case to the district court for resolution of *ancillary* factual issue." Pet. Br. at 9 (emphasis added). This is not what section 2347(b) says, however. The statute does not say anything about "ancillary issues"; it does not distinguish between "ancillary" and "main" issues and does not distinguish between hearings in which all issues were resolved and hearings in which "ancillary" issues were not resolved. There is, of course, no definition of "ancillary" in section 2347(b), nor does the government offer any definition or interpretive authority. In short, to adopt the government's suggestion that section 2347(b)(3) is the proper and necessary path for Respondents, the Court must read into the statute words and concepts that are not there. *Demarest v. Manspeaker, supra.*

3. Not surprisingly, no court has ever accepted such an interpretation of section 2347(b)(3), as far as *amici* are aware. The few reported decisions pertaining to or mentioning section 2347(b) in the non-immigration context illustrate that it is to be invoked when the agency has not conducted a hearing. For example, in *Florida Power and Light Co.*, the Court said: "The Hobbs Act specifically contemplated initial court of appeals review of agency orders resulting from proceedings in which no hearing took place." Further:

Given the choice of the Hobbs Act as the primary method of review of licensing orders, we have no reason to think Congress in the Atomic Energy Act would have intended to preclude initial court of appeals review of licensing proceedings in which a Commission hearing did not occur when the Hobbs Act specifically provides for such review and the

consequences of precluding it would be unnecessary duplication of effort.

Id. at 740-41.

In *Exportal Ltda v. U.S.A.*, 902 F.2d 45, 48, n.3 (D.C. Cir. 1990), the court said that the absence of a hearing is not an impediment to review under the Administrative Orders Review Act "when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented. 28 U.S.C. section 2347(b)(2) (1982)."

In *Lake Carriers' Ass'n v. U.S.A. (FCC)*, 414 F.2d 567-68 (6th Cir. 1969), the Federal Communications Commission had not conducted an evidentiary hearing on Lakes Carriers' request for a waiver. The Court of Appeals transferred the proceedings to the district court pursuant to section 2347(b)(3) "for the purpose of hearing evidence and making findings of fact as to the averments of the petition [for review]." After the district court conducted a "thorough evidentiary hearing" and filed comprehensive findings of fact and conclusions, the petitioners stipulated that the district court hearing constituted a hearing on the merits, as they had sought, and moved to dismiss their petition to review the FCC's decision.

Similarly, in *Radio Relay Corp. v. FCC*, 409 F.2d 322, 329-331 (2d Cir. 1969), Radio Relay requested the court transfer the matter to the district court for a hearing. Radio Relay conceded "that the Commission was not required to hold a hearing in this rule-making proceeding" but argued that the Commission should have conducted an evidentiary hearing in its discretion. *Id.* at 229-330. The Second Circuit avoided deciding whether Radio Relay was "entitled" to a hearing by holding that it had failed to present a "genuine issue of material fact, as section 2347(b)(3) requires." *Id.*

4. In the immigration context, the two courts of appeals to consider section 2347(b)(3) both have held that

it was precluded by former INA section 1105a(a)(4), requiring the court's determination to be solely on the administrative record. *Ghorbani v. INS*, 686 F.2d 784, 787, n.4 (9th Cir. 1982) (observing, however, that if section 2347(b) were available, its application would be appropriate in that case); *Coriolan v. INS*, 559 F.2d 993, 1003 (5th Cir. 1997) (transfer to the district court is available only where there is a question of nationality; section 1105(a)(5)(B) is specific, thus it overcomes section 1105a(a)(4)).

In its 1995 decision in this case, the Ninth Circuit rejected the government's assertion that section 2347(b) provided a mechanism for developing a factual record in this case. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 145, 1056-57 (9th Cir. 1995). Subsequently, post-IIRIRA, in its order dated February 5, 1997, the District Court rejected the INS' suggestion that a remand to district court under section 2347(b) might be appropriate. On appeal, the Ninth Circuit remained unpersuaded by the government's arguments. *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997).

With remarkable understatement, the government conceded that how section 2347(b)(3) would work in practice is "ambiguous." Pet. Br. at 48. There is neither a statute nor regulation nor case law to guide a court of appeals in the mechanics of a section 2347(b)(3) transfer to the district court after a final deportation order. The government argues that this procedure would apply in "exceptional" cases, but it is possible that every petitioner might argue that his or her case was appropriate for transfer on some newly discovered facts or on an issue not presented to the BIA. This is to say nothing of the thousands of people, such as those in *McNary*, *Jean v. Nelson*, and *Haitian Refugee Centers*, *supra*, who otherwise would bring their claims in a district court action.

IV. ALTHOUGH RESPONDENTS COULD NOT CHALLENGE THIS SELECTIVE ENFORCEMENT OF DEPORTATION PROCEEDINGS, MANY CONSTITUTIONAL CLAIMS MAY BE PRESENTED TO THE IMMIGRATION JUDGE AND THE BOARD OF IMMIGRATION APPEALS

1. Permitting Respondents to pursue their claim in the district court in the first instance will not open the floodgates to thousands of other non-citizens seeking to avoid deportation through preemptive district court actions. Unlike this case, where plaintiffs sought to prevent selective enforcement of the law, many allegations of the constitutional violations can be adjudicated by immigration judges and the BIA.

Courts sometimes have broadly said that the BIA lacks jurisdiction to adjudicate constitutional questions. *Gonzalez-Julio v. INS*, 34 F.3d 820, 822 (1994). "A narrower and more accurate statement would be that the BIA lacks jurisdiction to decide questions of the constitutionality of governing statutes or regulations." *Zhen Tau Liu v. Waters*, 55 F.3d 421, 425 (9th Cir. 1995). The BIA does have authority to "fix administratively correctable procedural errors, even when these errors are failures to follow due process." *Id.* at 426; *Alleyne v. INS*, 879 F.2d 1177, 1186, n.11 (3d Cir. 1989) (same); *Orhorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (BIA erred in reversing the immigration judge's decision to suppress documents seized in an "egregious" violation of constitutional rights); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (BIA erred in reversing immigration judge's decision to grant motion to suppress; stop resulted solely from Gonzalez's Hispanic appearance and constituted a bad faith and egregious violation of the Fourth Amendment); *Cf. INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

That some constitutional violations may be considered by immigration judges and the BIA does not mean that

all cases involving constitutional rights must be heard first or exclusively in deportation proceedings. Broad-based challenges to INS patterns and practices are properly brought in the district court. See discussion regarding *McNary*, *Jean v. Nelson*, and *Haitian Refugee Center*, *supra*. Further, facial constitutional challenges not requiring factual development can be decided initially in the courts of appeals. *Zhen Tau Liu v. Waters*, *supra*.

Respondents' claims also were properly brought in the district court. Respondents challenged the discretionary decision of the INS district director to commence deportation proceedings against them. The immigration judges and BIA have no authority to review the discretionary decision of the district director, nor to hold that such a decision violated Respondents' right to be free from selective enforcement. *Cheng Fan Kwok*, *supra*; *Ghorbani v. INS*, *supra*.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals and reserve traditional district court review of Respondents' statutory and constitutional claims under 8 U.S.C. section 1105a.

Respectfully submitted,

NADINE K. WETTSTEIN
AMERICAN IMMIGRATION LAW
FOUNDATION
1400 Eye Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 216-2400

IRA J. KURZBAN
Counsel of Record
PETER HOFER
KURZBAN, KURZBAN,
WEINGER & TETZELI
2650 SW 27th Avenue
Miami, FL 33133
(305) 444-0060

Attorneys for Amici Curiae

September, 1998

FILED

SEP 11 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 97-1252

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

JANET RENO, et al.,
Petitioners,

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, et al.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

Counsel:

JEFFREY L. BLEICH, ESQ.
HOJOON HWANG, ESQ.
DAVID H. FRY, ESQ.
CAROL WOLCHOK, ESQ.

Counsel of Record:

PHILLIP S. ANDERSON
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Attorneys for Amicus Curiae

Petition For Certiorari Filed: January 30, 1998
Certiorari Granted: June 1, 1998

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 382-2300

BEST AVAILABLE COPY

32 AP

TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. PROVISIONS OF IIRIRA MUST BE CONSTRUED TO AFFORD RESPONDENTS A FORUM FOR MEANINGFUL JUDICIAL REVIEW OF THEIR CONSTITUTIONAL CLAIMS	4
B. MEANINGFUL ACCESS TO JUDICIAL FORUM MAY, IN APPROPRIATE CIRCUMSTANCES, REQUIRE PROMPT ACCESS TO THE DISTRICT COURTS...	9
C. PROVIDING PROMPT ACCESS TO DISTRICT COURTS FOR RESOLUTION OF COLLATERAL CLAIMS PROMOTES THE EFFICIENT ADMINISTRATION OF IMMIGRATION LAWS AND IS CONSISTENT WITH CONGRESSIONAL INTENT	19
CONCLUSION	24

TABLE OF AUTHORITIES

Federal Cases

	<u>Page(s)</u>
<i>AADC v. Reno</i> , 70 F.3d 1045 (9th Cir. 1995)	15
<i>Abbott Laboratories v. Gardner</i> , 387 U.S. 136 (1967)	4, 20
<i>Aircraft & Diesel Equip. Corp. v. Hirsch</i> , 331 U.S. 752 (1947)	15
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	14
<i>Ardestani v. INS</i> , 502 U.S. 129 (1991)	2
<i>Bowen v. City of New York</i> , 476 U.S. 467 (1986)	20
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986)	4, 5
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945)	6
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977)	4
<i>Cameron v. Johnson</i> , 390 U.S. 611 (1968)	18
<i>Campos v. Nail</i> , 940 F.2d 495 (9th Cir. 1991)	22
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	14
<i>Cheng Fan Kwok v. INS</i> , 392 U.S. 206 (1968)	8
<i>Coriolin v. INS</i> , 559 F.2d 993 (5th Cir. 1977)	12

TABLE OF AUTHORITIES

FEDERAL CASES

	<u>Page(s)</u>
<i>Cox Broad. Corp. v. Cohn</i> , 420 U.S. 469 (1975)	18, 22
<i>El Rescate Legal Service v. EOIR</i> , 959 F.2d 742 (9th Cir. 1991)	22
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	17
<i>Estep v. United States</i> , 327 U.S. 114 (1946)	6
<i>Fort Wayne Books, Inc. v. Indiana</i> , 489 U.S. 46 (1989)	18
<i>Ghorbani v. INS</i> , 686 F.2d 784 (9th Cir. 1982)	12
<i>Gottesman v. INS</i> , 33 F.3d 383 (4th Cir. 1994)	9
<i>Haitian Refugee Center v. Smith</i> , 676 F.2d 1023 (5th Cir. 1982)	7, 8, 22
<i>Howlett v. Rose</i> , 496 U.S. 356 (1990)	19
<i>INS v. Cardoza-Fonseca</i> , 480 U.S. 421 (1987)	7
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	11
<i>Jean v. Nelson</i> , 727 F.2d 957 (11th Cir. 1984)	7, 8, 22
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974)	4
<i>Landon v. Plasencia</i> , 459 U.S. 21 (1982)	6

TABLE OF AUTHORITIES
FEDERAL CASES

	<u>Page(s)</u>
<i>Lincoln v. Vigil</i> , 508 U.S. 182 (1993)	4
<i>Makonnen v. INS</i> , 44 F.3d 1378 (8th Cir. 1995)	13
<i>Massieu v. Reno</i> , 915 F. Supp. 681 (D. N.J. 1996)	12
<i>Massieu v. Reno</i> , 91 F.3d 416 (3d Cir. 1996)	12
<i>Matthews v. Eldridge</i> , 424 U.S. 319 (1976)	5, 9, 15
<i>McCarthy v. Madigan</i> , 503 U.S. 140 (1992)	18
<i>McNary v. Haitian Refugee Center</i> , 498 U.S. 479 (1991)	passim
<i>Montes v. Thornburgh</i> , 919 F.2d 531 (9th Cir. 1990)	22
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494 (1977)	18
<i>National Socialist Party of America v. Village of Skokie</i> , 432 U.S. 43 (1977)	17
<i>Ng Fung Ho v. White</i> , 259 U.S. 276 (1922)	6
<i>Olaniyan v. INS</i> , 796 F.2d 373 (10th Cir. 1986)	9, 11
<i>Orantes-Hernandez v. Meese</i> , 685 F. Supp. 1488 (C.D. Cal. 1986)	7, 19, 22
<i>Orantes-Hernandez v. Thornburgh</i> , 919 F.2d 549 (9th Cir. 1990)	7

TABLE OF AUTHORITIES
FEDERAL CASES

	<u>Page(s)</u>
<i>Osaghae v. INS</i> , 942 F.2d 1160 (7th Cir. 1991)	13
<i>PUC of California v. United States</i> , 355 U.S. 534 (1958)	18
<i>Rafeedie v. INS</i> , 880 F.2d 506 (D.C. Cir. 1989)	20
<i>Salameda v. INS</i> , 70 F.3d 447 (7th Cir. 1995)	7
<i>Thunder Basin Coal Co. v. Reich</i> , 510 U.S. 200 (1994)	5, 15
<i>Tooloe v. INS</i> , 722 F.2d 1434 (9th Cir. 1983)	9, 10
<i>Traynor v. Turnage</i> , 485 U.S. 535 (1988)	5
<i>Turner v. Williams</i> , 194 U.S. 279 (1904)	6
<i>United States v. Armstrong</i> , 517 U.S. 456 (1996)	14
<i>United States v. Mendoza-Lopez</i> , 481 U.S. 828 (1987)	6
<i>United States v. Nourse</i> , 34 U.S. (9 Pet.) 8 (1835)	4
<i>Walters v. Reno</i> , No. C94-1204C, 1996 WL 897663 (W.D. Wash. Oct. 2, 1996)	22
<i>Walters v. Reno</i> , 145 F.3d 1032 (9th Cir. 1998)	22
<i>Webster v. Doe</i> , 486 U.S. 592 (1988)	4

TABLE OF AUTHORITIES

FEDERAL CASES

	<u>Page(s)</u>
<i>Wong Wing v. United States</i> , 163 U.S. 228 (1896)	6
<i>Yamataya v. Fisher</i> , 189 U.S. 86 (1903)	6
<i>Yi v. Maugans</i> , 24 F.3d 500 (3d Cir. 1994)	8
<i>Younger v. Harris</i> , 410 U.S. 37 (1971)	19

Statutes

8 U.S.C. § 1105a	<i>passim</i>
8 U.S.C. § 1160(e)	9
8 U.S.C. § 1252	12, 16, 17, 19
28 U.S.C. § 1331	8
28 U.S.C. § 2347	12, 13

Rules and Regulations

Federal Rule of Civil Procedure 56	14
U.S. Supreme Court Rule 37.3	1
U.S. Supreme Court Rule 37.6	1

TABLE OF AUTHORITIES

Legislative Authorities

	<u>Page(s)</u>
H.R. Rep. No. 104-469, pt. 1 (1996)	16
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009	<i>passim</i>
Immigration and Naturalization Act Section 241(a)(4)(C)(i)	11
Section 242	2, 3, 9, 24

Other Authorities

Immigration & Naturalization Service, <i>1996 Statistical Yearbook</i> (1996)	21
James Madison's Report, General Assembly of Virginia (January 7, 1800), reprinted in The Virginia Commission on Constitutional Government, The Kentucky-Virginia Resolutions and Mr. Madison's Report of 1799 (1960)	5, 6
Kenneth C. Davis & Richard J. Pierce, Jr., <i>Administrative Law Treatise</i> (1994)	4
P. Schuck and T. Wang, <i>Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990</i> , 45 Stan. L. Rev. 115 (1992)	7

Pursuant to this Court's Rule 37.3, *amicus curiae* American Bar Association ("ABA") respectfully submits this brief urging the Court to uphold the judgment of the Court of Appeals for the Ninth Circuit that the District Court below has jurisdiction to hear the claims of the respondents herein.¹

STATEMENT OF INTEREST

The ABA is a voluntary national membership organization of the legal profession. The ABA has over 400,000 members representing every state and territory and the District of Columbia. Its membership and constituency include prosecutors, public defenders, attorneys in private practice, trial and appellate judges at the state and federal levels, legislators, law professors, law enforcement and correction personnel, law students and a number of non lawyer associates in related fields.

The ABA has a historic interest in questions concerning the jurisdiction of federal courts to hear and decide claims by aliens seeking fair enforcement and implementation of our nation's immigration laws in accordance with the Constitution. Consistent with its objective of securing fair and constitutional implementation of immigration laws, the ABA's policymaking House of Delegates created in 1983 the Coordinating Committee on Immigration Law. This committee, consisting of representatives of nine ABA entities with relevant and specialized expertise (*e.g.*, in administrative law), has assisted in organizing numerous *pro bono*

¹This brief is filed with the consent of both petitioners and respondents, and letters reflecting those consents have been lodged with the Clerk of this Court. Pursuant to the Court's Rule 37.6, *amicus curiae* ABA states that this brief has not been authored in whole or in part by counsel for a party and that no person or entity, other than *amicus*, its members or its counsel have made a monetary contribution to the preparation or submission of this brief.

immigration representation efforts and trained volunteer attorneys from the private bar to counsel immigrants in deportation proceedings and represent them on appeal. The ABA has previously submitted briefs as *amicus curiae* in several matters before this Court concerning the rights of aliens seeking to remain in this country to obtain judicial review, including *McNary v. Haitian Refugee Center*, 498 U.S. 479 (1991) (supporting district court jurisdiction to hear broad-based challenge to INS procedures affecting resident alien farmworkers) and *Ardestani v. INS*, 502 U.S. 129 (1991) (in support of interpreting Equal Access to Justice Act to apply to deportation proceedings).

The ABA appears as *amicus curiae* in the case because the question presented herein has serious implications for the access of immigrants and other parties to an effective forum for judicial review of administrative agency action, particularly with respect to judicial review of constitutional claims arising from agency practices and procedures.²

STATEMENT OF THE CASE

In the interest of judicial economy, *amicus* respectfully refers the Court to the statement of the case contained in the Respondents' Brief for a full description of the facts relevant to the resolution of the question presented.

SUMMARY OF ARGUMENT

On this appeal, Petitioners erroneously contend that Section 242 of the Immigration and Naturalization Act

² Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial or individual member of the ABA. No inference should be drawn that any member of the Judicial Division of the ABA has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council of the ABA prior to filing.

("INA") as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"), divests the federal district courts of jurisdiction over constitutional claims arising from a decision by the Immigration and Naturalization Service ("INS") to initiate deportation proceedings against Respondents.

This Court has consistently held that congressional enactments regarding the jurisdiction of federal courts must be interpreted to permit meaningful judicial review of colorable constitutional claims, in order to avoid the grave constitutional questions that would arise if Congress were to foreclose review of such claims. Based on this concern, this Court has narrowly construed administrative review provisions that appear facially to preclude review of the merits of an administrative determination prior to the exhaustion of administrative remedies, in order to permit adequate and timely review of constitutional claims.

In interpreting Section 242 of the INA, as amended by Section 306 of IIRIRA, the ABA urges that this Court ensure that aliens' access to a meaningful forum for vindication of their constitutional rights is preserved by providing, in appropriate cases, for prompt review of colorable constitutional claims in the federal district courts. Where, as here, a constitutional claim requires the development of a factual record for proper resolution, meaningful review requires access to the district courts, which are the only federal judicial fora capable of developing an adequate factual record. Moreover, in this and many other cases, access to the federal district courts at the outset would serve Congress' dual goals of providing meaningful review of constitutional claims and of efficient administration of the immigration laws.

ARGUMENT

A. PROVISIONS OF IIRIRA MUST BE CONSTRUED TO AFFORD RESPONDENTS A FORUM FOR MEANINGFUL JUDICIAL REVIEW OF THEIR CONSTITUTIONAL CLAIMS.

1. In construing congressional enactments governing the jurisdiction of the federal courts, this Court has long recognized that grave questions of constitutional law, implicating principles of separation of powers and due process, would arise if Congress deprived Article III courts of the power to review colorable constitutional claims. *E.g.*, *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Califano v. Sanders*, 430 U.S. 99, 109 (1977). Due to these grave concerns, the Court has adopted a strong presumption that Congress does not intend to intrude upon the courts' power and duty to assure that the government acts within constitutional limits. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 1263 (1803)); *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835). Because of the importance of providing judicial review of administrative action for claimed constitutional defects, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967); accord, *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993). This Court moreover, in applying such principles, has consistently interpreted congressional enactments in a manner that would assure that constitutional violations would not be insulated from Article III review. *See e.g.*, *Johnson v. Robison*, 415 U.S. 361, 367-73 (1974) (holding that statute purporting to preclude review over all claims did not affect jurisdiction over constitutional claims); *see also*, Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise*, § 17.9 (1994).

The Court has also stressed that judicial review of constitutional claims must be provided at a time and in a manner that would render such review *meaningful*. Thus, even where statutory language appears at first blush to require exhaustion of administrative remedies, such provisions have been interpreted to preserve initial district court jurisdiction over claims that would otherwise escape meaningful review. *See Bowen, supra*; *Traynor v. Turnage*, 485 U.S. 535, 544-45 (1988); *Matthews v. Eldridge*, 424 U.S. 319, 326-32 (1976). Notwithstanding seemingly-applicable exhaustion requirements, the Court has "upheld district court jurisdiction over claims considered wholly collateral to a statute's review provisions and outside the agency's expertise . . . where a finding of preclusion could foreclose all meaningful judicial review." *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994) (internal quotations and citations omitted); *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496-97 (1991) (upholding district court jurisdiction over due process challenge to INS procedure where application of review provision would preclude "meaningful judicial review").

2. Although the government contends that this canon of constitutional law and statutory interpretation applies with less force when the party seeking review is an alien, Pet. Br. at 39-40, this Court has never suggested that the constitutional significance of meaningful judicial review is diminished in the immigration context. Indeed, the nature and magnitude of the liberty interest at stake counsels that access to meaningful judicial review is particularly important to an alien facing deportation. The significance of an alien's due process interest in avoiding wrongful deportation cannot be overstated. As James Madison observed:

If the banishment of an alien from a country into which he has been invited . . . where he may have formed the most tender of connections, where he may have vested his

entire property and acquired property . . . and where he may have nearly completed his probationary title to citizenship . . . , if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the norms can be applied.

Mr. (James) Madison's Report, General Assembly of Virginia (January 7, 1800) (reprinted in *The Virginia Commission on Constitutional Government, The Kentucky-Virginia Resolutions and Mr. Madison's Report of 1799*, 36 (1960)).

Consistent with these concerns, this Court has repeatedly recognized that the protections of the Due Process Clause of the Fifth Amendment apply to all persons within the United States, including aliens. See e.g., *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *United States v. Mendoza-Lopez*, 481 U.S. 828, 838 (1987). In particular, the Court has held without exception that, in light of the significant deprivation that deportation imposes on the liberty of an alien, meaningful judicial review of the lawfulness of the deportation order is required. See *Landon v. Plasencia*, 459 U.S. 21, 35 (1982) (the court, not Congress or the INS, must determine "whether the [deportation] procedures meet the essential standard of fairness under the Due Process Clause").³

Judicial review is also particularly important in this context given the frequency with which deportation orders or related proceedings have been found unlawful. The federal

³ See also, *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Meticulous care must be exercised lest the [deportation] procedure . . . not meet the essential standards of fairness."); *Yamataya v. Fisher*, 189 U.S. 86, 101 (1903); *Ng Fung Ho v. White*, 259 U.S. 276, 285 (1922); *Turner v. Williams*, 194 U.S. 279, 295 (1904) (Brewer, J., concurring) ("I do not believe it within the power of Congress to give ministerial officers a final adjudication of the right to liberty, or to oust the courts from the duty of inquiry respecting both law and facts.").

courts have played an indispensable role in vindicating the constitutional rights of aliens against the INS's disregard of constitutional limitations on its authority. Courts have found that aliens in agency proceedings have been subjected to, for example: procedures that indisputably failed to satisfy the minimum standards of due process, see *McNary*, 498 U.S. at 487-89; a scheme to meet numerical targets for removal of Haitians at the expense of their rights to seek asylum in this country, see *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1029-32 (5th Cir. 1982), *disapproved on other grounds*, *Jean v. Nelson*, 727 F.2d 957, 976 n. 27 (11th Cir. 1984); and a pattern and practice of using misrepresentations, intimidation, coercive detention and transfer policies, and other measures intended to dissuade Salvadoran refugees from raising claims of asylum, see *Orantes-Hernandez v. Meese*, 685 F. Supp. 1488, 1494-1503 (C.D. Cal. 1986), *aff'd sub nom. Orantes-Hernandez v. Thornburgh*, 919 F.2d 549 (9th Cir. 1990).⁴

⁴ Given the significant liberty interest implicated, review of statutory claims are equally necessary in the deportation context. See *Estep v. United States*, 327 U.S. 114, 123 n. 14 (1946) (even where Congress has made a deportation order "final," court retained power to review administrative decision to determine whether it had basis in fact). Even with respect to whether a deportation order is valid as a statutory matter, the agency's determinations have historically been found erroneous in a significant number of cases. See P. Schuck and T. Wang, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-1990*, 45 Stan. L. Rev. 115, 167 (1992) (finding that aliens prevailed in the courts in approximately 23-36% of "statutory cases" principally involving final orders of deportation or exclusion between 1979 and 1990). As the Seventh Circuit has recently acknowledged, "The proceedings of the [INS] are notorious for delay, and the opinions rendered by its judicial officers, including the members of the Board of Immigration Appeals, often flunk minimum standards of adjudicative rationality." *Salameda v. INS*, 70 F.3d 447, 449 (7th Cir. 1995) (Posner, C.J.). See also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Blackmun, J., concurring) (commenting on the INS's "seemingly purposeful blindness" to a statutory "standard entrusted to its care").

3. The importance of the interest at stake and the historical prevalence of constitutional violations in this particular context counsel in favor of an unflinching application of the presumption in favor of meaningful judicial review. Courts have consistently found jurisdiction over challenges to the procedures and policies employed by the INS prior to the commencement of deportation proceedings, in recognition of the importance of providing meaningful judicial review and of the unsuitability of the procedures governing review of an order of deportation (e.g., 8 U.S.C. § 1105a (1994)) for review of collateral claims that require a factual record for proper resolution. See *McNary*, *supra*; *Smith*, 676 F.2d at 1032-33; *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd as to remand*, 472 U.S. 846 (1985). As the Third Circuit noted after surveying the caselaw, the district courts were deemed to retain their general federal question jurisdiction under 28 U.S.C. § 1331 "when the challenged administrative practice, policy or regulation precluded adequate development of the administrative record and consequently meaningful review through the procedures set forth in § 1105a, and/or when the challenged practice was collateral and divorced from the substantive aspects underlying the alien's claim of asylum." *Yi v. Maugans*, 23 F.3d 500, 506 (3d Cir. 1994).⁵

⁵The doctrine that matters collateral to an order of deportation or issues requiring factual development are not within the scope of the former § 1105a has its genesis in this Court's opinion in *Cheng Fan Kwok v. INS*, 392 U.S. 206 (1968), as well as in the Court's jurisprudence in general administrative law cases noted above. In *Cheng Fan Kwok*, the Court held that § 1105a's limitation on district court jurisdiction extended only to "final orders of deportation" and did not encompass matters that could not be determined in deportation proceedings, such as whether regional INS district directors lawfully exercised their discretion to stay deportation of an otherwise removable alien. If the alien seeks review of such collateral matters, the Court stated, "the alien's remedies would, of course, ordinarily lie first in an action brought in the appropriate district court." *Id.* at 210. As noted, numerous courts

Accordingly, Section 242 of the INA, as amended by IIRIRA, should be interpreted to preserve district court jurisdiction upon which these courts relied to vindicate important constitutional and statutory rights of aliens facing deportation.

B. MEANINGFUL ACCESS TO JUDICIAL FORUM MAY, IN APPROPRIATE CIRCUMSTANCES, REQUIRE PROMPT ACCESS TO THE DISTRICT COURTS.

Under this Court's jurisprudence, the theoretical availability of access to a judicial forum is not enough to provide meaningful review of a constitutional claim. Thus, the Court has found that appellate court review of a claim that requires a factual record for proper resolution — a record that the agency would not and the court of appeals could not develop — is insufficient. *McNary*, *supra*. The Court has also cautioned that a review procedure that would cause irreparable injury to be suffered in the interim is inadequate. *Matthews v. Eldridge*, *supra*. These considerations demonstrate that Petitioners' proposed procedures for judicial review of claims would be inappropriate in this and many other cases.

1. The Court's opinion in *McNary*, *supra*, is illustrative of the importance of a factual record for meaningful review of a constitutional claim. In *McNary*, a class of aliens challenged the INS's procedures for determining an alien's eligibility for legalization of his or her status. The respon-

of appeals have followed this instruction and concluded that judicial review of matters not encompassed by a final order of deportation (thus outside the scope of the exclusive review provisions of § 1105a) were properly raised in an original action brought in the federal district courts. E.g., *Olaniyan v. INS*, 796 F.2d 373, 376-77 (10th Cir. 1986); *Toolee v. INS*, 722 F.2d 1434, 1437-38 (9th Cir. 1983); see *Gottesman v. INS*, 33 F.3d 383, 387 (4th Cir. 1994) (collecting cases).

dents in *McNary* claimed (and the Court agreed) that INS procedures did not apprise them of the evidence against them, afford them an opportunity to rebut such evidence or present witnesses, or provide them with interpreters that would allow them to communicate effectively with the adjudicator. 498 U.S. at 487-89. The judicial review provision at issue in *McNary*, 8 U.S.C. § 1160(e), precluded review of an adverse determination and provided that judicial review could be obtained in the court of appeals pursuant to § 1105a if and when an order of deportation was issued. However, the Court held that this procedure failed to provide for a meaningful review of the aliens' claims.

Evidence of such constitutional defects in INS procedures "would have been irrelevant in the processing of a particular individual application." *Id.* at 497. The agency's administrative review process did not address the kind of procedural and constitutional claims brought by the respondents, and the record of proceedings in any individual eligibility determination would not have included evidence pertaining to the INS's procedures and practice. *Id.* at 493. Under such circumstances, the Court held, limiting review to the court of appeals after an order of deportation had issued, and then only on the record of the administrative proceedings, would result in the denial of meaningful judicial review. *Id.* at 496 ("if not allowed to pursue their claims in the District Court, respondents would not as a practical matter be able to obtain meaningful judicial review"). Because the courts of appeals "lack[ed] the factfinding and record-developing capabilities of a federal district court," the possibility that the respondents in *McNary* would eventually have access to the court of appeals was deemed insufficient to satisfy the requirement of meaningful review. *Id.* at 497. Thus, the Court's opinion in *McNary* confirmed that § 1105a did not apply to a collateral claim that required the development of a factual record in the district courts.

The factors that formed the bases of the Court's holding in *McNary* are fully applicable to Respondents' claim. As in *McNary*, Respondents do not challenge in the District Court proceeding the substantive grounds on which the charges against them are purportedly based, such as whether they have failed to maintain student status or overstayed their visas. As Petitioners concede, evidence regarding the agency's motivation in deciding to initiate proceedings against these Respondents or evidence regarding the agency's conduct towards similarly situated aliens — *i.e.*, evidence pertaining to the elements of Respondents' selective enforcement claim — would be irrelevant and could not be developed in agency proceedings.⁶ Accordingly, applying the exclusive *appellate* jurisdiction of the former § 1105a, or

⁶The need for a factual record distinguishes the instant case from this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), a case which *amicus curiae* Criminal Justice Legal Foundation contends brings Respondents' claim within the scope of exclusive appellate review procedures of § 1105a. In *Chadha*, the Court held that the appellate courts had jurisdiction to determine the constitutional validity of the "legislative veto" on a petition for review of a final order of deportation, because such an order "includes all matters on which the validity of the final order is contingent, rather than only those determinations actually made at the hearing." *Id.* at 937. *Amicus* fails to distinguish, however, between legal issues (*e.g.*, constitutional validity of the legislative veto) implicated by a deportation order and issues requiring a factual record for proper resolution. Even if *Chadha* establishes appellate jurisdiction, pursuant to § 1105a, to resolve a legal claim requiring no fact finding, such review would not be applicable to Respondents' selective enforcement claim, given the need for a factual record. See *Olaniyan*, 796 F.2d at 376; *Tooloe*, 722 F.2d at 1437.

Massieu v. Reno, 91 F.3d 416 (3d Cir. 1996), a case which Petitioners erroneously contend is in conflict with the opinion below, is not to the contrary. The court in *Massieu* held that a challenge to the constitutionality of Section 241(a)(4)(C)(i) of the INA should be brought in the court of appeals pursuant to § 1105a. As the district court in that case noted, because the case involved a facial challenge to the constitutionality of a statute, the "claims . . . present[ed] 'pure questions of law' for

(continued)

the new § 1252(a), to Respondents' claim would result in "the practical equivalent of a total denial of judicial review of generic constitutional and statutory claims." *McNary*, 498 U.S. at 497.⁷

2. Recognizing the need for developing a factual record and reversing their consistent position over many years,⁸ Petitioners urge that Respondents can receive meaningful

(continued)

which no agency fact-finding would be required or even marginally illuminating." *Massieu v. Reno*, 915 F. Supp. 681, 694 (D. N.J. 1996). The Third Circuit did not question the proposition that general federal question jurisdiction would remain available for claims that could not be meaningfully reviewed in the court of appeals for want of a factual record. See 91 F.3d at 423 (quoting *Maugans*, *supra*).

⁷ Other factors considered relevant in *McNary* also favor the exercise of district court jurisdiction in this case. Like the statute at issue in *McNary*, the provisions of § 1252(b)(4)(A) and the former § 1105a(a)(3) both require the court of appeals to limit its consideration to the administrative record, thereby appearing to preclude the consideration of additional evidence in the court of appeals. Moreover, IIRIRA provides that the "administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary." 8 U.S.C. § 1252(b)(4)(B) (emphasis added); see also 8 U.S.C. § 1105a(a)(4) (1994) (imposing similar standard of deference to agency fact finding). This deferential standard of review is arguably even more stringent than the abuse of discretion standard at issue in *McNary*, which the Court noted should not apply to review of facts applicable to constitutional claims, 498 U.S. at 494, and indicates that § 1252(a) likewise should not govern Respondents' claim.

⁸ Prior to this case, the INS had consistently (and successfully) argued that a remand to the district court pursuant to § 2347(b) was contrary to the requirement that the validity of an order of deportation was to "be determined solely upon the administrative record upon which the deportation order is based." 8 U.S.C. § 1105a(a)(4) (1994). See e.g., *Coriolin v. INS*, 559 F.2d 993, 1003 & n. 14 (5th Cir. 1977); *Ghorbani v. INS*, 686 F.2d 784, 787 n. 4 (9th Cir. 1982). A notable exception was in *McNary*, where the INS argued in its reply brief that

(continued)

review of their claim if the Court interprets 28 U.S.C. § 2347(b) to authorize the court of appeals, on an appeal from a final order of removal, to remand the case to the district court for the development of a factual record. Regardless of whether a remand procedure under § 2347(b) is available or appropriate in some situations, a remand to the district court will not always assure that a constitutional claim would be afforded meaningful review.

a. First, Petitioners seek to require a threshold evidentiary showing that would "as a practical matter" foreclose meaningful judicial review. *McNary*, 498 U.S. at 497. Under Petitioners' proposal, the alien would be required "*at the time the petition for review is filed*, to proffer specific evidence indicating that the decision to initiate deportation proceedings had been made for a constitutionally forbidden reason." Pet. Br. at 48-9 n. 23 (emphasis added). Remand would then be allowed "only in the very rare case where the court of appeals concludes that the alien's submission, if credited, refutes the government's explanation for the charging decision [and] therefore, requires resolution of disputed questions of material fact." *Id.*

Petitioners fail to note that evidence of the government's reasons underlying its charging decisions are exclusively in the control of the government. Accordingly, such evidence would be inaccessible to aliens as a general matter without

(continued)

such a remand is in fact available under § 2347(c) or § 2347(b)(3). See Reply Brief for the Petitioners, 1989 U.S. Briefs (LEXIS) 1332, Part (b) & n. 10. In subsequent cases before the courts of appeals, however, the INS reversed its position again and argued that § 1105a(a)(4) prohibits the court of appeals from considering evidence not contained in the record of the agency proceeding. See e.g., *Makonnen v. INS*, 44 F.3d 1378, 1385 (8th Cir. 1995); *Osaghae v. INS*, 942 F.2d 1160, 1162 (7th Cir. 1991).

the discovery procedures available in the district courts.⁹ As noted, deportation proceedings do not allow the alien to inquire into or discover evidence regarding the bases of the charging decision or violations of agency procedure — an inquiry that is beyond the jurisdiction of an immigration judge. Accordingly, an alien “at the time the petition is filed” will almost never have access to such evidence and would be wholly unable to rebut the government’s explanation of its motives.

As this case demonstrates, Petitioners’ proposed evidentiary hurdle will foreclose potentially meritorious claims. Specific evidence regarding the INS’s improper motive in initiating the proceedings against Respondents was uncovered during the course of the district court litigation and not before. For example, statements by the INS regional counsel that the government sought to deport Respondents for their membership in the PFLP (Pet. App. 82a) or FBI memoranda urging the deportation of Respondents for protected First Amendment activities (JA 130-206) resulted from or were discovered in the district court litigation. Based on the evidence developed during the course of the litigation, the District Court found and the Court of Appeals

⁹Petitioners’ proposed standard — in its search for a disputed issue of fact and in its allocation of burdens — evokes the standard applicable to a summary judgment motion under Fed. R. Civ. P. 56. However, such drastic summary procedures may not be used to cut off a claim at its inception where a party has not been afforded any discovery. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Moreover, Petitioners’ proposal is inconsistent with this Court’s recent holding that a criminal defendant is entitled to discovery of the government’s reasons for prosecuting particular cases if the defendant makes “a credible showing of different treatment of similarly situated persons.” *United States v. Armstrong*, 517 U.S. 456, 470 (1996). Such a showing can be made by the use of statistics, *i.e.*, type of evidence *not* exclusively in the government’s control, *see id.* at 469-70, and does not require a defendant to “refute[]” the government’s explanation of its motive.

affirmed that Respondents have a reasonable probability of success on the merits of their claim. Had Respondents been required to produce specific evidence of the government’s motive at the outset, as Petitioners propose, Respondents’ claim would not have been given adequate judicial review.

b. Moreover, Petitioners’ contention ignores the doctrine that, where irreparable injury would result from a delay in the resolution of a constitutional claim, meaningful review may require access to the district courts in the first instance. This Court has admonished that exhaustion requirements are not to be mechanically applied “where the petitioner has made a colorable showing that full postdeprivation relief could not be obtained.” *Thunder Basin Coal Co.*, 510 U.S. at 213 (citing *Matthews*, 424 U.S. at 331). As the Court stated in *Aircraft & Diesel Equip. Corp. v. Hirsch*:

[T]he presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending *irreparable injury flowing from delay incident to following prescribed procedure*, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention.

331 U.S. 752, 773 (1947) (emphasis added). The Court of Appeals below correctly recognized “[t]he ‘core principle’ . . . that statutory requirements should not be construed to cause ‘irreparable injuries to be suffered’ or the loss of ‘crucial collateral claims.’” *AADC v. Reno*, 70 F.3d 1045, 1057 (9th Cir. 1995) (quoting *Matthews*, 424 U.S. at 331 n. 11); *see also Matthews*, 424 U.S. at 333 (due process requires “the opportunity to be heard ‘at a meaningful time and in a meaningful manner’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965))).

Nothing in IIRIRA suggests that Congress intended to preclude district court jurisdiction to issue injunctive relief in order to prevent irreparable harm to aliens against whom deportation proceedings have already commenced. Indeed, the legislative history of Section 306 of IIRIRA demonstrates the contrary. In discussing 8 U.S.C. § 1252, and referring in particular to § 1252(f), the House Committee on the Judiciary noted that:

Section 306 also limits the authority of Federal courts other than the Supreme Court to enjoin the operation of the new removal procedures established in this legislation. These limitations do not preclude challenges to the new procedures, but the procedures will remain in force while such lawsuits are pending. In addition, *courts may issue injunctive relief pertaining to the case of an individual alien, and thus protect against any immediate violation of rights.* However, *single district courts* or courts of appeal do not have authority to enjoin procedures established by Congress to reform the process of removing illegal aliens from the U.S.

H.R. Rep. No. 104-469, pt. 1, at 161 (1996) (emphases added).

The Committee's report illuminates two aspects of congressional intent relevant to the proper interpretation of IIRIRA. First, Congress clearly contemplated that "lawsuits" could be brought in the "district courts" seeking to restrain the operation of the provisions of IIRIRA. Second, the Committee stated that injunctive relief pertaining to the case of an alien would be available in order to "protect against any *immediate* violation of rights," indicating Con-

gress' intent that proceedings that would violate an alien's constitutional rights may be enjoined at the outset.¹⁰

In this case, Respondents challenge the INS's decision to selectively enforce the immigration laws against them based on their associational activities protected by the First Amendment. It is well-settled that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.) (citing *New York Times, Co. v. United States*, 403 U.S. 713 (1971)). In light of this concern, the Court has repeatedly emphasized in a variety of contexts the necessity for prompt resolution of colorable First Amendment claims. For example, the Court has stressed that state courts, when enjoining activity potentially protected by the First Amendment, must provide "strict procedural safeguards, including immediate appellate review." *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 44 (1977) (citations omitted). The Court has also applied a relaxed standard of finality in determining whether lower court rulings are appealable,

¹⁰Congress' understanding of § 1252(f), as shown in the House Report, also demonstrates that the Court of Appeals correctly ruled that § 1252(g) incorporates § 1252(f) by reference. Given that Congress intended to allow access to the district courts for aliens to whom § 1252(f) applies, Petitioners' interpretation of § 1252(g) would lead to the anomalous result that *only* those aliens who had been in deportation proceedings prior to the effective date of other provisions of § 1252 would be denied access to the district courts. Under that view, such aliens would be subject to a *stricter* limitation on access to judicial review than aliens to whom Congress intended *all* provisions of IIRIRA to apply. Such an interpretation would be flatly inconsistent with Petitioners' own premise that Congress intended IIRIRA generally to limit judicial review from that which was available under prior law. Thus, *amicus* submits that it is far more consistent with the intent of Congress to construe § 1252(g) as incorporating the *jurisdiction preserving* elements of other subsections of § 1252, such as § 1252(f)(1), prior to their nominal effective date.

where uncertainty regarding important questions of First Amendment law would likely deter the free and unfettered exercise of speech. *E.g.*, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 54-56 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975). Finally, the Court has "allowed persons subject to claimed unconstitutional restrictions on their freedom of expression to challenge that restriction" without resorting to designated administrative procedure, in cases where "the loss or postponement of precious First Amendment rights . . . was a concomitant of the available administrative procedure." *Moore v. City of East Cleveland*, 431 U.S. 494, 528 n. 3 (1977) (Burger, C.J., dissenting). *Cf.* *PUC of California v. United States*, 355 U.S. 534, 540 (1958) ("where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right"); *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992).

Similarly here, the inability to obtain a prompt determination of constitutional claims implicating the First Amendment would have the impermissible effect of silencing the contributions of aliens to the public debate on matters of national and international concern. Without prompt access to the district courts, aliens may be subjected to selective enforcement of the immigration laws for protected activities without being able to present their claims to *any* adjudicatory body until deportation proceedings and administrative appeals that routinely take years to complete have concluded.¹¹

¹¹ This fact establishes the crucial distinction between the instant case and this Court's cases holding that, even where the First Amendment is implicated, federal courts ordinarily should not enjoin pending state court proceedings, such as *Cameron v. Johnson*, 390 U.S. 611 (1968),

(continued)

Other types of irreparable injuries may also necessitate prompt judicial review in the district courts. For example, the INS's practice of coercing aliens with potentially meritorious asylum claims to agree to voluntarily depart the country, a practice that was enjoined in *Orantes-Hernandez*, *supra*, would present another compelling case of irreparable injury — once an alien is coerced into "voluntarily" departing, the statutory right to seek asylum and the constitutional right to minimally adequate procedure can no longer be vindicated. Accordingly, the Court should refrain from holding that the exclusive review provisions of § 1252 can be mechanically applied to all claims that arguably fall within its reach.

C. PROVIDING PROMPT ACCESS TO DISTRICT COURTS FOR RESOLUTION OF COLLATERAL CLAIMS PROMOTES THE EFFICIENT ADMINISTRATION OF IMMIGRATION LAWS AND IS CONSISTENT WITH CONGRESSIONAL INTENT.

Although Petitioners contend that they rely upon the purported intent of Congress in enacting IIRIRA to streamline, consolidate and expedite the process of removing an alien from the United States, the goals of judicial and administrative efficiency and expedited removal can and will be served in appropriate instances by permitting initial review of a collateral claim. As the Court has noted, the

(continued)

upon which Petitioners rely. Under the Supremacy Clause, state courts are required to hear a defendant's federal claims in the first instance. *See e.g.*, *Howlett v. Rose*, 496 U.S. 356 (1990). Moreover, consistent with principles of federalism, state courts are presumed equally capable as federal courts of providing an adequate hearing to such claims. *See e.g.*, *Younger v. Harris*, 410 U.S. 37 (1971). Neither consideration applies to the proceedings of the immigration courts, which could not even consider Respondents' constitutional challenge.

"application of the exhaustion doctrine is 'intensely practical' " and should be "guided by the policies underlying the exhaustion requirement." *Bowen v. City of New York*, 476 U.S. 467, 484 (1986) (quoting *Matthews*, 424 U.S. at 331 n. 11); *Abbott Laboratories*, 387 U.S. at 149-50 (stating that doctrine of finality may be applied in a "pragmatic" and "flexible" way); see also *Rafeedie v. INS*, 880 F.2d 506, 529-30 (D.C. Cir. 1989) (Ginsburg, C.J., concurring) (Congress does not "in codifying an exhaustion rule, . . . inevitably and inexorably mean[] to preclude early judicial review even when requiring exhaustion in a specific case would serve none of the purposes motivating the requirement and would threaten grievous harm to the person seeking review"). In this and many other cases in which the courts have found district court jurisdiction, the interpretation of IIRIRA urged by Petitioners would fail to serve the intent of Congress to expedite resolution of claims relating to the removal of aliens.

1. In this case, adopting the government's proposal would neither eliminate any layer of judicial review nor lead to a more expeditious removal (assuming that removal would be lawful) of Respondents. As noted, Respondents' claim is entirely collateral to the determination of whether they are deportable on the basis of the substantive charges against them. See *City of New York*, 476 U.S. at 483. Because Respondents' claim is outside the scope of INS's decisional authority, Respondents would be required under Petitioners' proposal to go through the multiyear process of deportation hearings and administrative appeal, while holding their constitutional claim in abeyance. At the conclusion of that process, they would present their claim to the court of appeals for determination as to whether a remand is necessary, adding another element to the court of appeals' tasks on direct review of an order of removal.

Accepting the District Court's preliminary findings (affirmed by the Ninth Circuit) regarding the merits of Respondents' claim, a remand would be necessary even under the stringent standard proposed by Petitioners.¹² Once the case is remanded to the district court, a hearing on the claim of selective enforcement would then begin. At the conclusion of district court proceedings, the court of appeals would then review that judgment and either uphold or invalidate the orders of removal accordingly. If Respondents ultimately prevail, the significant burdens of the deportation proceedings — on Respondents, on the government and on the free speech interests of Respondents and others — would have been incurred for no purpose. If the government ultimately prevails, it would have done so without eliminating any layer of review: indeed, Petitioner's proposal would have added an additional layer of appellate court review.¹³

¹²Due to the lack of discovery, Respondents would not likely be able to present the evidence upon which the District Court's findings were based. That possibility, of course, provides no warrant for favoring Petitioners' approach. See Part B.2, *supra*.

¹³Although Petitioners raise the specter of unmeritorious or frivolous cases brought in the district courts for the sole purpose of delaying deportation proceedings, declaratory judgment actions in this context are extremely rare. According to INS statistics, 1,648,986 aliens were apprehended by the INS in 1996. Immigration & Naturalization Service, *1996 Statistical Yearbook*, 173, Table 58 (1996). The vast majority (1,572,798) departed voluntarily, while over 68,000 aliens were deported or excluded pursuant to an order of removal. *Id.* In comparison, federal courts resolved only 138 declaratory judgment actions (the bases for which are not revealed by the statistics) brought against the INS involving exclusion or deportation. *Id.*, 194, Table 76. Allowing appropriate cases to go forward in the district courts under the standards developed by the federal courts in interpreting former § 1105a, therefore, will not result in the district courts being inundated with frivolous suits. Moreover, the district courts are certainly capable of assessing the merits of such cases and properly refusing to enjoin any agency proceedings.

On the other hand, if the District Court properly has jurisdiction over Respondents' suit, and Respondents prevail on the merits, a needless and unlawful administrative process would have been avoided. The Court of Appeals would not have the burden of direct review of orders of removal on the merits as well as considering the constitutional claim. Thus, there is no reason to believe that Petitioners' proposal, as opposed to Respondents' interpretation of IIRIRA, better effectuates Congress' intent to expedite the process of removal and lighten the burdens on the courts and the agency. *Cf. Cox Broadcasting*, 420 U.S. at 485-87 (requirement of finality must be given pragmatic application so that unnecessary proceedings would be avoided in appropriate cases).

2. Indeed, in many of the cases where district court jurisdiction was previously found, Petitioners' proposed procedure would have resulted in an enormous waste of judicial and administrative resources. In these, so-called "pattern and practice" cases, the validity of a deportation order on the merits is not at issue: rather, the claimed defect is that the agency has systemically violated, through its policies and procedures, the constitutional and statutory rights of a broad class of aliens in adjudicating their immigration status. *See McNary, supra; Haitian Refugee Center v. Smith, supra; Orantes-Hernandez, supra; Jean v. Nelson, supra; Walters v. Reno*, 145 F.3d 1032 (9th Cir. 1998); *Walters v. Reno*, No. C94-1204C, 1996 WL 897663 (W.D. Wash. Oct. 2, 1996); *Montes v. Thornburgh*, 919 F.2d 531 (9th Cir. 1990); *Campos v. Nail*, 940 F.2d 495 (9th Cir. 1991); *El Rescate Legal Serv. v. EOIR*, 959 F.2d 742 (9th Cir. 1991). Here again, application of the exhaustion requirement would ill-serve the policies underlying the requirement.

If an alien facing deportation cannot bring a broad-based challenge to the agency's pattern of unlawful behavior, the agency would devote substantial resources and subject the alien to the burdens of administrative proceedings in order

to issue an order of removal that would be valid on the substantive grounds alleged but may be defective on a collateral constitutional or statutory ground. Given that the agency will not entertain the alien's claim during the administrative proceedings, and that no judicial determination thereof can be made until the proceedings conclude, the agency would presumably continue to subject other aliens to the same unlawful practices in the meantime. By the time that such a claim could be reviewed in the federal courts, this may result in innumerable removal orders (and *actual removals*) of uncertain validity.

If the alien's claim is ultimately upheld, the agency would have wasted considerable resources in issuing removal orders that suffer from the same defect. At that point, the agency would have two choices. It could attempt to reargue the merits of the court's ruling upon review of each and every order of removal affected by the unlawful practices, resulting in a great deal of waste of judicial and administrative resources and possibly in inconsistent outcomes. In the alternative, the agency could reopen the deportation proceedings in a large number of cases and, having abandoned the unlawful practices, reassess the removal orders. In any event, a large number of aliens that would have been removable on the merits would receive the windfall of continuing their presence in this country for the duration of the new administrative and/or judicial proceedings, a result which Petitioners contend was the principal evil that Congress sought to address by the exclusive review provisions of the INA. Pet. Br. at 20-21 n. 7.

On the other hand, if such "pattern or practice" cases may be heard in the district court in the first instance, both the agency and aliens facing deportation would be able to obtain a prompt resolution of the claim and proceed to the administrative proceeding on the merits. Such claims could be adjudicated on a class-wide basis, as has been the normal

practice in the federal courts, eliminating the wasteful litigation of identical factual issues on review of each removal order affected by the unlawful practice. Even a prompt judicial determination of an individual claim would as a practical matter reduce the number of cases that may be infected by unlawful agency practices and procedures, and ensure that substantively valid removal orders can be quickly executed. Accordingly, in such cases, Petitioners' proposed limitation on judicial review would result in precisely the kind of delay in removing deportable and excludable aliens that Congress intended to avoid, and deprive the courts of an efficient mechanism for resolving constitutional and statutory claims affecting a broad class of aliens.

In sum, Petitioners' proposal to deprive district courts of jurisdiction over this infrequent but important constitutional claim has been rejected twice by the Court of Appeals, is not mandated by a proper reading of Section 242 of the INA (as amended by IIRIRA), is not supported by this Court's precedents, and would be detrimental to public policy.

CONCLUSION

For all of the foregoing reasons, the Court should affirm the judgment of the Court of Appeals.

Dated: September 11, 1998

Of Counsel

JEFFREY L. BLEICH
HOJOON HWANG
DAVID H. FRY
CAROL WOLCHOK

Respectfully Submitted: ~

Counsel of Record

PHILLIP S. ANDERSON
AMERICAN BAR ASSOCIATION

FILED

SEP 11 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

(12)
No. 97-1252

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1998

JANET RENO, et al.,
Petitioners,
v.
AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, et al.
Respondents.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF THE NATIONAL IMMIGRATION
LAW CENTER AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

GERALD L. NEUMAN
435 West 116th Street
New York, New York 10027

LINTON JOAQUIN*
National Immigration Law Center
1102 South Crenshaw Blvd.,
Suite 101
Los Angeles, California 90019
(323) 938-6452

Counsel for Amicus Curiae
** Counsel of Record*

Petition For Certiorari Filed: January 30, 1998
Certiorari Granted: June 1, 1998

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

BEST AVAILABLE COPY

24 PR

QUESTION PRESENTED

Whether, in light of the Illegal Immigration Reform and Immigrant Responsibility Act, the courts below had jurisdiction to entertain respondents' challenge to the deportation proceedings prior to the entry of a final order of deportation.

TABLE OF CONTENTS

	<u>Page</u>
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. SECTION 1252(g) CANNOT BE READ LITERALLY, BUT MUST BE RECONCILED WITH OTHER STATUTORY PROVISIONS AND TRADITIONAL PRESUMPTIONS	5
II. THIS COURT SHOULD BE CAREFUL TO READ SECTION 1252(g) IN A MANNER THAT PRESERVES THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS	7
A. THE CONSTITUTION GUARANTEES TO ALIENS THE RIGHT TO CHALLENGE THE LAWFULNESS OF THEIR DETENTION AND DEPORTATION BY WRIT OF HABEAS CORPUS	9
B. SECTION 1252(g) DOES NOT EXPRESSLY REPEAL THE STATUTORY RIGHT TO HABEAS CORPUS	15
CONCLUSION	16

TABLE OF AUTHORITIES

Federal Cases

	<u>Page(s)</u>
<i>Barrera-Echavarria v. Rison</i> , 44 F.3d 1441 (9th Cir. 1995)	5
<i>Carlson v. Landon</i> , 324 U.S. 524 (1952)	12, 13
<i>Chin Yow v. United States</i> , 208 U.S. 8 (1908)	11
<i>Ex parte Bollman</i> , 8 U.S. (4 Cranch) 75 (1807)	9
<i>Ex parte Watkins</i> , 28 U.S. (3 Pet.) 193 (1830)	10
<i>Ex parte Yerger</i> , 75 U.S. (8 Wall.) 85 (1869)	3, 15
<i>Felker v. Turpin</i> , 518 U.S. 651 (1996)	3, 10, 15
<i>Fong Yue Ting v. U.S.</i> , 149 U.S. 698 (1893)	13
<i>Gegiow v. Uhl</i> , 239 U.S. 3 (1915)	12
<i>Goncalves v. Reno</i> , 144 F.3d 110 (1st Cir. 1998)	4, 9, 15
<i>Granfinanciera, S.A. v. Nordberg</i> , 492 U.S. 33 (1989)	14
<i>Heikkila v. Barber</i> , 345 U.S. 229 (1953)	12
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	13, 15

TABLE OF AUTHORITIES
FEDERAL CASES

	<u>Page(s)</u>
<i>In re Jung Ah Lung</i> , 25 F. 141 (D. Cal. 1885)	11
<i>Jean-Baptiste v. Reno</i> , 144 F.3d 212 (2d Cir. 1998)	15
<i>Justiz-Cepero v. INS</i> , 882 F. Supp. 1582 (D. Kan. 1995)	6
<i>Kessler v. Strecker</i> , 307 U.S. 22 (1939)	12
<i>Landon v. Plasencia</i> , 459 U.S. 21 (1982)	14
<i>Lee v. Reno</i> , ____ F. Supp. 2d ____, 1998 WL 430131 (D.D.C. July 27, 1998)	7
<i>Lynch v. Cannatella</i> , 810 F.2d 1363 (5th Cir. 1987)	6
<i>Magana-Pizano v. INS</i> , ____ F.3d ____, 1998 WL 550111, 1998 U.S. LEXIS 21355 (9th Cir. Sept. 1, 1998)	4, 7, 9
<i>Mahler v. Eby</i> , 264 U.S. 32 (1924)	12
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	9
<i>Nishimura Ekiu v. United States</i> , 142 U.S. 651 (1892)	11
<i>Pak v. Reno</i> , ____ F. Supp. ____, 1998 WL 344969 (N.D. Ohio May 29, 1998)	7

TABLE OF AUTHORITIES
FEDERAL CASES

	<u>Page(s)</u>
<i>Reno v. Flores</i> , 507 U.S. 292 (1993)	6
<i>Sanchez v. Rowe</i> , 651 F. Supp. 571 (N.D. Tex. 1986)	6
<i>Shaughnessy v. Pedreiro</i> , 349 U.S. 48 (1955)	12
<i>Swain v. Pressley</i> , 430 U.S. 372 (1977)	8, 10
<i>Tang Tun v. Edsell</i> , 223 U.S. 673 (1912)	11
<i>Truong v. INS</i> , ____ F. Supp. 2d ____, 1998 WL 466584 (E.D. Cal. Aug. 11, 1998)	5
<i>United States ex rel. Accardi v. Shaughnessy</i> , 347 U.S. 260 (1954)	13
<i>United States ex rel. Tanfara v. Esperdy</i> , 347 F.2d 149 (2d Cir. 1965)	8
<i>United States ex rel. Vajtauer v. Commissioner</i> , 273 U.S. 103 (1927)	11, 12
<i>United States v. Jung Ah Lung</i> , 124 U.S. 621 (1888)	11
<i>United States v. Mendoza-Lopez</i> , 481 U.S. 828 (1987)	15
<i>Yamataya v. Fisher</i> , 189 U.S. 86 (1903)	13

TABLE OF AUTHORITIES

Statutes

	<u>Page(s)</u>
8 U.S.C. § 1105(a)	5
8 U.S.C. § 1252(g)	<i>passim</i>
28 U.S.C. § 2241	4, 9, 15

Constitutional Authorities

U.S. Constitution,	
Article I, § 9	8, 9
Article I, § 8	13
Article III	8

Rules and Regulations

United States Supreme Court Rule 37.6	1
---	---

Other Authorities

Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997)	6
Developments in the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970)	10
Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum. L. Rev. 961 (1998)	9, 11, 12

TABLE OF AUTHORITIES

OTHER AUTHORITIES

	<u>Page(s)</u>
Gerald L. Neuman, The Constitutional Requirement of "Some Evidence," 25 San Diego L. Rev. 631 (1988)	11
Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953)	14
Hiroshi Motomura, The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights, 92 Colum. L. Rev. 1625 (1992)	14
Richard H. Fallon, Jr., Applying the Suspension Clause to Immigration Cases, 98 Colum. L. Rev. 1068 (1998)	8

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1998

JANET RENO, et al.,
Petitioners,

v.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, et al.
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

**BRIEF OF THE NATIONAL IMMIGRATION
LAW CENTER AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

STATEMENT OF INTEREST

The National Immigration Law Center (NILC) is a national legal support center dedicated to protecting the rights of low-income immigrants and their family members.¹

¹ Pursuant to Supreme Court Rule 37.6, *Amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *Amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure the fairness and constitutionality of immigration law enforcement.

NILC is filing this brief because the present case involves a jurisdictional issue — the interpretation of 8 U.S.C. § 1252(g) — that has crucial implications for the protection of the rights of immigrants. These implications extend far beyond the context of the present case, and will not be adequately addressed by the parties.

Both parties have given written consent to the filing of this brief.

SUMMARY OF ARGUMENT

This is the first case in which this Court has been asked to construe 8 U.S.C. § 1252(g), an important provision whose meaning and constitutionality are currently being litigated in the lower federal courts. An overly broad reading of Section 1252(g) would create unintended conflicts with other statutes and with basic presumptions of our constitutional system. These conflicts must be considered in deciding what kinds of "cause or claim . . . arising from" certain actions of the Attorney General are barred by Section 1252(g). If no other adequate judicial forum is available to Respondents, Section 1252(g) is susceptible to an interpretation that permits them to seek injunctive relief.

Although this case involves only the availability of judicial review *before* the entry of a final removal order, the Government's Brief uses this case as a vehicle for criticizing court of appeals decisions that preserve the availability of habeas

corpus jurisdiction in the district courts *after* entry of a deportation order, for aliens who have no other judicial remedy against unlawful removal. The Government thereby raises momentous constitutional issues beyond the scope of this case, which should be reserved until they can be adequately briefed in a case that actually presents them.

If Section 1252(g) were construed as barring the availability of habeas corpus to aliens who have no other judicial remedy to challenge the legal validity of their removal, then it would violate the Habeas Corpus Suspension Clause of the Constitution. The historical core of the writ of habeas corpus is the judicial inquiry into the lawfulness of executive detention. This Court has always understood detention of aliens for immigration enforcement purposes as within the scope of the writ, and has always preserved habeas inquiry against congressional efforts to confer finality on deportation orders.

The traditional presumption against implied repeal of the habeas corpus statute also supports the consistency of Section 1252(g) with continued habeas corpus jurisdiction in the district courts. As this Court held in *Felker v. Turpin*, 518 U.S. 651 (1996), and *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), withdrawal of habeas corpus jurisdiction will not be inferred from doubtful language.

ARGUMENT

The issue raised by the present case is whether Respondents may seek relief in district court against prospective removal before the completion of administrative removal proceedings against them. The Government contends that such relief is precluded by 8 U.S.C. § 1252(g), which provides:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction

to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

Under the Government's interpretation, Respondents would be required to await the entry of a final removal order and then seek judicial review under Section 1252, despite their claim that such a proceeding would not provide an adequate forum for vindication of their constitutional rights.

The Government's Brief goes further, however, and criticizes court of appeals decisions holding that district courts continue to possess jurisdiction in habeas corpus for aliens who, unlike Respondents, have no other judicial forum in which to challenge removal orders on constitutional or statutory grounds. Brief for Petitioners at 45 n.20, 25 n.12. The Government thereby invites the Court to address issues of great constitutional importance in a case where they are not actually presented and where they cannot be adequately briefed. *Amicus* respectfully submits that this case provides no proper occasion for resolving the interaction of Section 1252(g) with the habeas corpus statute, 28 U.S.C. § 2241. To clarify the importance of the constitutional issue raised by the Government's suggestions, however, *Amicus* will sketch in Part II of this brief why Section 1252(g) would be unconstitutional if it barred resort to habeas corpus. See also *Magana-Pizano v. INS*, ___ F.3d ___, 1998 WL 550111, 1998 U.S. App. Lexis 21355 (9th Cir. Sept. 1, 1998) (finding Section 1252(g) unconstitutional on assumption that it precludes employment of habeas corpus); *Goncalves v. Reno*, 144 F.3d 110 (1st Cir. 1998) (construing Section 1252(g) as consistent with Section 2241, partly to avoid constitutional objection).

I.

SECTION 1252(g) CANNOT BE READ LITERALLY, BUT MUST BE RECONCILED WITH OTHER STATUTORY PROVISIONS AND TRADITIONAL PRESUMPTIONS.

The Government's own Brief admits that Section 1252(g) cannot be read literally. Brief for the Petitioners at 30 n.15. Section 1252(g) begins "[e]xcept as provided in *this* section, and notwithstanding *any* other provision of law." (Emphasis added.) Nonetheless, the Government argues that judicial review of a final order of deportation must be available to the Respondents in accordance with former 8 U.S.C. § 1105a and the transition provisions of IIRIRA, to avoid "an anomalous result."

The Government is correct, but its concession is too narrow. The courts will need to be alert to other anomalous results that would follow from too broad or literal an interpretation of Section 1252(g). Some of these anomalies, like the one identified by the Government, may result from the interaction of Section 1252 with other provisions enacted by IIRIRA. Other anomalies may result from the interaction of Section 1252 with other statutes, or with basic constitutional assumptions.

For example, the Government suggests — at present — that Section 1252(g) should be read as precluding review of "any aspect of the removal process except in the context of a challenge to a final order of removal." Taken at face value, this interpretation would bar any review of detention for purposes of removal, even if that detention stretches on for years after the entry of the final order because the alien cannot actually be removed. Cf. *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (reviewing legality of continued detention of excludable alien who arrived in Mariel boatlift in 1980); *Truong v. INS*, ___ F. Supp. 2d

_____, 1998 WL 466584 (E.D. Cal. Aug. 11, 1998) (reviewing legality of continued detention of resident alien after three years of unsuccessful efforts to deport him to Vietnam). Review of final removal orders must be sought within 30 days of the order, see Section 1252(b)(1), and therefore could not provide a vehicle for inquiry into subsequent detention. The Government's interpretation would also preclude any later litigation seeking a prospective remedy for unconstitutional conditions of confinement. *Cf. Reno v. Flores*, 507 U.S. 292, 301 (1993) (noting consent decree on conditions of confinement for deportable alien children); *Justiz-Cepero v. INS*, 882 F. Supp. 1582 (D. Kan. 1995) (evaluating conditions of confinement of excludable alien under due process clause).

A literal reading of Section 1252(g) would also appear to bar any damage claims, under the Federal Tort Claims Act or in a Bivens action against individual officers, for injuries unlawfully inflicted upon an alien in the course of the physical execution of a removal order, no matter how egregious the officer's misconduct. *Cf. Lynch v. Cannatella*, 810 F.2d 1363 (5th Cir. 1987) (Bivens action available for gross physical abuse in removal process); *Sanchez v. Rowe*, 651 F. Supp. 571 (N.D. Tex. 1986) (FTCA claim and Bivens action arising from abuse by Border Patrol agent). Literally, such a claim could be characterized as "any cause or claim by . . . an alien arising from the . . . action by the Attorney General to . . . execute removal orders." Instead, the courts must determine sensible limits on the phrase "any cause or claim" that would reconcile Section 1252(g) with the Federal Tort Claims Act and the presumptive availability of remedies for constitutional violations.

As these examples illustrate, Section 1252(g) does not reveal its meaning in isolation, but must be construed "alongside the remainder of the *corpus juris*." Antonin Scalia, *A Matter of Interpretation: Federal Courts and the*

Law 17 (1997). If, as Respondents contend, the procedure for review of a final order would have been inadequate to vindicate their constitutional rights — a question which this brief does not address — then the superficial breadth of Section 1252(g)'s language should not prevent an interpretation that would provide them an adequate forum.

II.

THIS COURT SHOULD BE CAREFUL TO READ SECTION 1252(g) IN A MANNER THAT PRESERVES THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS

The Government's Brief expressly invites the Court's attention to the implications of Section 1252(g) for the availability of habeas review of deportation orders, an issue currently being litigated in the lower federal courts. Brief for Petitioners at 45 n.20.² *Amicus* agrees that this Court should construe Section 1252(g) with the awareness that later cases will raise issues regarding habeas corpus, statutory and constitutional questions of the highest significance. Contrary to the Government's view, *Amicus* suggests that this fact counsels extreme caution in the interpretation of Section 1252(g), so as not to preclude the proper resolution in a later case of issues that are not presented in the present case, and cannot be adequately briefed here.

The Government concedes that Respondents in the present case have a right to judicial review in the court of appeals of a final removal order if one is ever entered against

²The Government cites four court of appeals cases. Other recent decisions include *Magana-Pizano v. INS*, ____ F.3d ____, 1998 WL 550111, 1998 U.S. Lexis 21355 (9th Cir. Sept. 1, 1998); *Lee v. Reno*, ____ F. Supp. 2d ____, 1998 WL 430131 (D.D.C. July 27, 1998), and *Pak v. Reno*, ____ F. Supp. ____, 1998 WL 344969 (N.D. Ohio May 29, 1998).

them. The question of preclusion of review of a removal order, therefore, does not arise in this case. The Government bases this concession on its interpretation of Section 1252(g) as accommodating the transition review procedures of IIRIRA. Brief for Petitioners at 30-31 n.15. But there are more fundamental reasons outside IIRIRA for conceding Respondents' right to a judicial forum in the event of any future removal order.

As *Amicus* will sketch *infra*, aliens being deported from the United States are entitled to judicial inquiry into the lawfulness of their removal, including compliance with both constitutional and statutory limits on executive power, regardless of whether such inquiry is provided for by Section 1252. This entitlement arises from at least two sources: the Suspension Clause of Article I, § 9, and the traditional presumption against repeal of the courts' statutory authority to issue writs of habeas corpus under 28 U.S.C. § 2241.³ So long as Congress provides an adequate alternative avenue of review, the alien may be required to employ that avenue, and Section 2241 remains in the background. See *United States ex rel. Tanfara v. Esperdy*, 347 F.2d 149, 152 (2d Cir. 1965) (finding petition for review adequate means of testing legality of detention under deportation order); see also *Swain v. Pressley*, 430 U.S. 372, 383-84 (1977) (similar analysis in context of postconviction relief). But where Congress does not provide an adequate alternative avenue, the entitlement to habeas corpus regains its priority.⁴

³ Another possibility is that this entitlement also arises directly from a proper understanding of Article III. See Richard H. Fallon, Jr., Applying the Suspension Clause to Immigration Cases, 98 Colum. L. Rev. 1068 (1998). *Amicus* will not elaborate this argument here.

⁴ The Brief of Amici Washington Legal Foundation et al., at 19, erroneously asserts that habeas corpus jurisdiction could be removed from the lower federal courts on the theory that *this* Court would have jurisdiction to review an executive removal decision directly on an

Two recent court of appeals cases illustrate the twin bases of an alien's entitlement to habeas corpus. In *Goñcalves v. Reno*, 144 F.3d 110, 118-23 (1st Cir. 1998), the First Circuit construed Section 1252(g) as preserving access to habeas corpus under Section 2241, relying on both the traditional presumption against repeal of habeas corpus jurisdiction and on the need to avoid the constitutional question that would otherwise be raised. In *Magana-Pizano v. INS*, ___ F.3d ___, 1998 WL 550111, 1998 U.S. App. Lexis 21355 (9th Cir. Sept. 1, 1998), the Ninth Circuit directly confronted the constitutional issue after an earlier panel of that court had rigidly interpreted Section 1252(g) as barring resort to habeas corpus. The Ninth Circuit concluded that, as so interpreted, Section 1252(g) violated the Suspension Clause.

A. THE CONSTITUTION GUARANTEES TO ALIENS THE RIGHT TO CHALLENGE THE LAWFULNESS OF THEIR DETENTION AND DEPORTATION BY WRIT OF HABEAS CORPUS.

The Constitution provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I, § 9, cl. 2. The Suspension Clause prohibits not only total suspension of the writ, but also partial suspensions directed at particular persons or categories of cases. See Gerald L. Neuman, Habeas Corpus, Executive Detention, and the Removal of Aliens, 98 Colum.

original writ of habeas corpus. That theory violates the principle of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that this Court's original jurisdiction is limited. The grant of a writ of habeas corpus directly to an executive official, in a case that is not within the jurisdiction of any lower court, would be an impermissible exercise of original jurisdiction. See *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807).

L. Rev. 961, 976-80 (1998) [hereinafter, Neuman, Habeas Corpus].

An alien's right to habeas corpus when detained for removal includes the right to raise both constitutional and statutory objections to the removal order. "The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is, the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment." *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (Marshall, C.J.). It is essential to separate the application of habeas corpus to detention by order of *executive* officials from current controversies over its application as a remedy for prisoners confined after a state *court* criminal conviction. Judicial inquiry into the lawfulness of executive detention implicates the traditional core of the writ. See *Felker v. Turpin*, 518 U.S. 651, 663 (1996); *Swain v. Pressley*, 430 U.S. 372, 380 n.13 (1977); *id.* at 386 (Burger, C.J., concurring). Historically, "[w]hile habeas review of a court judgment was limited to the issue of the sentencing court's jurisdictional competency, an attack on an executive order could raise all issues relating to the legality of the detention." Developments in the Law — Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1238 (1970).⁵

This Court settled long ago that habeas corpus law applies to the review of immigration decisions. Soon after the federal government began regulating immigration, the government tried to argue that exclusion did not restrain an alien of his liberty within the meaning of habeas corpus doctrines, and this Court rejected that argument. *United*

⁵ *Amicus* takes no position on the question of what the Suspension Clause may currently require with regard to habeas corpus review of a criminal conviction.

States v. Jung Ah Lung, 124 U.S. 621, 626 (1888); see also *In re Jung Ah Lung*, 25 F. 141, 142 (D. Cal. 1885) ("If the denial, therefore, to the petitioner of the right to land, thus converting the ship into his prison-house, to be followed by his deportation across the sea to a foreign country, be not a restraint of his liberty within the meaning of the habeas corpus act, it is not easy to conceive any case that would fall within its provisions."); cf. Neuman, Habeas Corpus, *supra*, 98 Colum. L. Rev. at 990-1004 (describing earlier uses of habeas corpus in extradition and other situations analogous to deportation).

When Congress attempted to confer finality on the decisions of immigration officers in the 1890s, this Court affirmed the alien's entitlement to a writ of habeas corpus "to ascertain whether the restraint is lawful," and limited the effect of this finality to executive findings of fact. *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). Thereafter, this Court consistently preserved habeas corpus scrutiny of the lawfulness of deportation decisions against Congress's efforts to confer "finality" upon them. The Court subsequently modified its doctrine concerning finality of fact when it recognized, in light of due process requirements, that the existence of *some* evidentiary basis for the finding must be open to inquiry on habeas. See, e.g., *Chin Yow v. United States*, 208 U.S. 8 (1908); *Tang Tun v. Edsell*, 223 U.S. 673 (1912); *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103 (1927);⁶ Gerald L. Neuman, The Constitutional Requirement of "Some Evidence," 25 San

⁶ Some lower courts have been confused by the emphasis on constitutional issues in this Court's opinion in *Vajtauer*, which reflected the fact that the case had been brought to this Court on direct appeal from the district court on the basis of the presence of a constitutional issue. See *Vajtauer*, 273 U.S. at 105 (citing Judicial Code § 238 as authorizing direct appeal). In that period, cases raising only statutory issues, e.g., *Geglow v. Uhl*, 239 U.S. 3 (1915), reached this Court on certiorari from the courts of appeals.

Diego L. Rev. 631, 637-41 (1988). Of particular significance, this Court regularly employed habeas corpus to keep executive officials within the bounds of their statutory authority in exclusion and deportation, and this review encompassed non-constitutional as well as constitutional claims. See, e.g., *Gegiow v. Uhl*, 239 U.S. 3 (1915); *Mahler v. Eby*, 264 U.S. 32 (1924); *Kessler v. Strecker*, 307 U.S. 22 (1939).

The Court recounted this history in *Heikkila v. Barber*, 345 U.S. 229, 233-35 (1953), and concluded that the statutes adopted between 1891 and 1917 had precluded review "to the fullest extent possible under the Constitution." These limitations remained in force until the enactment of the Immigration and Nationality Act of 1952 made the judicial review provisions of the Administrative Procedure Act applicable to proceedings arising thereunder, unlike *Heikkila*, which was decided under the 1917 Immigration Act. See *Shaughnessy v. Pedreiro*, 349 U.S. 48 (1955).

The APA had the effect of expanding the scope of judicial authority over immigration decisions from the constitutional minimum of habeas inquiry to the full scope of APA judicial review. The Court in *Heikkila* contrasted the due process "some evidence" test with the APA test of substantial evidence on the record as a whole in explaining the difference between habeas inquiry and "judicial review." *Id.* at 236 & n.11 (citing *Vajtauer, supra*, and *Bridges v. Wixon*, 326 U.S. 135 (1945)).⁷ Nor does the constitutional mini-

⁷The traditional distinction between habeas inquiry and judicial review, see Neuman, *Habeas Corpus, supra*, 98 Colum. L. Rev. at 1002, 1010, 1019, must be kept in mind to understand the dictum, often quoted out of context, in *Carlson v. Landon*, 324 U.S. 524, 537 (1952), that "No judicial review is guaranteed by the Constitution." The Brief of Washington Legal Foundation, et al. in Support of Petitioners, at 16 n.7, quotes this sentence, suppressing with an ellipsis the sentence, "This

mum of inquiry embrace the full scope of abuse of discretion doctrines developed under the APA. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954).

Vague references to the "sweeping authority" of Congress over immigration, see Brief for Petitioners at 40, do not override the entitlement to habeas inquiry. Congress's power over immigration does not trump all constitutional protections, and especially not guarantees of separation of powers and proper procedure. As this Court explained in *INS v. Chadha*, 462 U.S. 919 (1983), invalidating a legislative veto over discretionary relief from deportation:

The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power. As we made clear in *Buckley v. Valeo*, "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction."

462 U.S. at 940-41 (citations omitted). Congress's broad substantive power over immigration policy has often been tempered by judicially enforceable procedural guarantees, especially in connection with deportation proceedings, in which this Court has consistently held due process norms applicable. See, e.g., *Yamataya v. Fisher*, 189 U.S. 86 (1903) (affirming procedural due process limits on deporta-

power is, of course, subject to judicial intervention under the 'paramount law of the constitution.'" *Carlson*, 324 U.S. at 533 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 713-15 (1893)). The passage in *Fong Yue Ting* observes that administrative officials may execute the immigration laws "except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the Constitution, to intervene," evidently a reference to the Suspension Clause.

tion); *Landon v. Plasencia*, 459 U.S. 21, 32-34 (1982) (emphasizing increasing constitutional protection of aliens after their entry to the United States); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 Colum. L. Rev. 1625 (1992). Like these other constitutionally mandated procedural rights, Congress cannot deprive aliens of the privilege of the writ of habeas corpus. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1393, 1397 (1953).

Nor is there any inconsistency between the constitutional necessity for habeas inquiry into deportation decisions under the Suspension Clause and the characterization of immigration matters as suitable for executive adjudication under the "public rights" doctrine. As Justice Scalia has emphasized, the "public rights" doctrine is a historically based rule grounded on the theory of sovereign immunity. See *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68-70 (1989) (Scalia, J., concurring in part and concurring in the judgment). Although this Court has permitted deportation decisions to be made as an initial matter by executive officials, it has always preserved habeas corpus inquiry into the lawfulness of those decisions. There is no historical tradition of executive detention immune from habeas corpus. To the contrary, this Court's nineteenth century cases establishing the public rights doctrine assume the availability of the writ. See *Neuman, Habeas Corpus*, supra, 98 Colum. L. Rev. at 1030-31 (discussing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), and *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892)).

If Section 1252(g) could not be construed as permitting judicial inquiry into the legality of deportation decisions as required by the Suspension Clause, it would be unconstitu-

tional. It would then have to be severed, as this Court has severed other unconstitutional provisions of the immigration laws. See *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987); *INS v. Chadha*, 462 U.S. 919 (1983). This Court would, however, be properly reluctant to reach the constitutional issue unnecessarily. *Amicus* submits that these wider ramifications provide a further compelling reason to avoid an overly literal interpretation of Section 1252(g) in the present case.

B. SECTION 1252(g) DOES NOT EXPRESSLY REPEAL THE STATUTORY RIGHT TO HABEAS CORPUS

In addition to the principle of avoiding unconstitutional interpretations of statutes, another rule of statutory interpretation requires reconciliation of Section 1252(g) with Section 2241. As this Court observed in *Felker v. Turpin*, 518 U.S. 651, 660-61 (1996), repeals by implication are disfavored, and a specific tradition particularly disfavors implied repeals of habeas corpus jurisdiction under 28 U.S.C. § 2241. See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 103 (1869) (preserving "efficacy of the writ" by rejecting "any construction giving to doubtful words the effect of withholding or abridging this jurisdiction"). Given all the other respects in which Section 1252(g)'s limitation of "cause[s] and claim[s]" needs to be construed to reconcile it with other provisions of law, it cannot be said that Section 1252(g) expressly repeals Section 2241 in the removal context. See *Goncalves v. Reno*, 144 F.3d 110, 120-22 (1st Cir. 1998) (analyzing Section 1252(g) in the context of IIRIRA and finding no language repealing Section 2241); *Jean-Baptiste v. Reno*, 144 F.3d 212, 218-19 (2d Cir. 1998).

CONCLUSION

For the foregoing reasons, this Court should reject the Government's efforts to give 8 U.S.C. § 1252(g) an overly literal interpretation, and should construe it in a manner that would ensure the Respondents an adequate judicial forum for the vindication of their constitutional rights. At the same time, the Court should construe Section 1252(g) in a fashion that would avoid the necessity of a future finding of unconstitutionality under the Suspension Clause. Assuming that judicial review after the issuance of a final removal order would not provide Respondents an adequate judicial forum — an issue this brief does not address — the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Of Counsel

Gerald L. Neuman
435 West 116th Street
New York, N.Y. 10027

Counsel of Record

Linton Joaquin
National Immigration Law Center
1102 South Crenshaw Boulevard,
Suite 101
Los Angeles, CA 90019
(323) 938-6452

September 11, 1998

SEP 11 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

October Term, 1997

JANET RENO, ATTORNEY GENERAL, *et al.*,

Petitioners,

vs.

AMERICAN-ARAB ANTI-DISCRIMINATION
COMMITTEE, *et al.*,

Respondents.

*On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit*

**BRIEF OF *AMICUS CURIAE* THE BRENNAN CENTER
FOR JUSTICE AT NEW YORK UNIVERSITY
SCHOOL OF LAW IN SUPPORT OF RESPONDENTS**

BURT NEUBORNE

Counsel of Record

E. JOSHUA ROSENKRANZ

MARTA NELSON

BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY
SCHOOL OF LAW

Attorneys for Amicus Curiae

161 Avenue of the Americas

5th Floor

New York, New York 10013

(212) 998-6730



26 pp

TABLE OF CONTENTS

	<i>Page</i>
Table of Cited Authorities	ii
Interest of <i>Amicus Curiae</i>	1
Introduction and Summary of Argument	2
Argument	6
I. The Commencement Of Pretextual Deportation Proceedings Against The Targeted Aliens Constitutes Administrative Action Designed To Punish And Deter Activity Protected By The First Amendment.	6
II. The First Amendment Requires Timely Access To Judicial Review Whenever Law Enforcement Officials Act To Punish And Deter Protected First Amendment Activity.	9
III. The Court Of Appeals Was Correct In Reading The Relevant Statutory Language To Permit Timely Access To Judicial Review.	16
Conclusion	20

TABLE OF CITED AUTHORITIES

	Page
Cases Cited:	
<i>Bantam Books v. Sullivan</i> , 372 U.S. 58 (1963)	6, 10
<i>Blount v. Rizzi</i> , 400 U.S. 410 (1971)	5
<i>Board of Airport Comm'rs v. Jews for Jesus, Inc.</i> , 482 U.S. 569 (1987)	6
<i>Brandenburg v. Ohio</i> , 395 U.S. 444 (1969)	10
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945)	3
<i>Carey v. Brown</i> , 100 S. Ct. 455 (1980)	12
<i>Chicago Police Department v. Mosely</i> , 408 U.S. 92 (1972)	12
<i>City of Lakewood v. Plain Dealer Publishing Co.</i> , 486 U.S. 750 (1988)	5, 7, 12
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	10
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976)	5
<i>Forsyth County v. The Nationalist Movement</i> , 505 U.S. 123 (1992)	5
<i>Freedman v. Maryland</i> , 380 U.S. 51 (1965)	5, 11
<i>F.T.C. v. Standard Oil Co. of California</i> , 449 U.S. 232 (1980)	15

Table of Cited Authorities

	Page
<i>FW/PBS Inc. v. Dallas</i> , 493 U.S. 215 (1990)	11
<i>Grayned v. City of Rockford</i> , 408 U.S. 104 (1972) ...	6
<i>Heller v. New York</i> , 413 U.S. 483 (1973)	5
<i>In re Asbestos School Litigation</i> , 46 F.3d 1284 (3rd Cir. 1994)	8
<i>INS v. Chadha</i> , 462 U.S. 919 (1983)	16
<i>Lopez-Telles v. INS</i> , 564 F.2d 1302 (9th Cir. 1977) ..	4
<i>Marcus v. Search Warrant</i> , 367 U.S. 717 (1961)	5, 12, 13
<i>National Student Ass'n v. Hershey</i> , 412 F.2d 1103 (D.C. Cir. 1969)	19
<i>Oestereich v. Selective Serv. System Local Bd. No. 11</i> , 393 U.S. 233 (1968)	19
<i>Reno v. American Civil Liberties Union</i> , __ U.S. __, 117 S. Ct. 2329 (1997)	6, 12
<i>Rosenberger v. Rector and Visitors of the University of Virginia</i> , 515 U.S. 819 (1995)	12
<i>Shuttlesworth v. City of Birmingham</i> , 394 U.S. 147 (1969)	5, 11
<i>Smith v. Goguen</i> , 415 U.S. 566 (1974)	6

Table of Cited Authorities

	<i>Page</i>
<i>Southeastern Promotions, Ltd. v. Conrad</i> , 420 U.S. 546 (1975)	5, 11
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989)	10
<i>United States v. Eichman</i> , 496 U.S. 310 (1990)	10
<i>United States v. Hollywood Motor Car Co.</i> , 449 U.S. 263 (1982)	15
<i>United States v. Thirty-Seven Photographs</i> , 402 U.S. 363 (1971)	5, 12, 13
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	15
<i>Wolff v. Selective Serv. System Local Bd. No. 16</i> , 372 F.2d 817 (2d Cir. 1967)	19
Statutes Cited:	
8 U.S.C. § 1252(b)(4)(A) (Supp. II 1996)	4
8 U.S.C. § 1252(b)(9) (Supp. II 1996)	18
8 U.S.C. § 1252(f) (Supp. II 1996)	3, 7, 17, 18
8 U.S.C. § 1252(g) (Supp. II 1996)	3, 7
28 U.S.C. § 2347(b)(3)	17

Table of Cited Authorities

	<i>Page</i>
United States Constitution Cited:	
U.S. Const.: Amend. I	<i>passim</i>
Art. I, § 8, cl. 4	16
Rule Cited:	
Supreme Court Rule 37.6	1

**BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT
NEW YORK UNIVERSITY SCHOOL OF LAW AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at New York University School of Law ("the Brennan Center") is a partnership between and among the family and friends of Justice William J. Brennan, Jr., many of his law clerks, and the faculty of New York University School of Law, designed to honor Justice Brennan's extraordinary contribution to American law.¹ The Brennan Center's ideal is to unite the intellectual resources of the academy with the pragmatic expertise of the bar in an effort to assist courts and legislatures in developing practical solutions to difficult problems in areas of special concern to Justice Brennan. Before giving his approval to the enterprise, Justice Brennan obtained a promise that the Brennan Center would function as a non-partisan, independent center of thought, paying no special deference to his views or to the opinions that he authored.

The Brennan Center's Judicial Independence Project addresses the critical role that an independent judiciary plays in our self-consciously divided system of government. The Center submits this brief *amicus curiae* in support of respondents because the historic role of the judiciary in safeguarding individual rights is threatened by the jurisdictional position asserted in this case by petitioners, the Immigration and Naturalization Service (INS). The INS argues that judicial review of an alien's claim that he was targeted for lengthy

1. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus*, contributed monetarily to the preparation and submission of this brief.

deportation proceedings because of his political beliefs must await the issuance of a final order of deportation. But the courts' ability to protect an alien's right to engage in controversial political speech is utterly dependent upon the ability to review claims of First Amendment violations in a timely manner. Otherwise the political speech rights sought to be protected — both of those aliens facing deportation proceedings and other aliens similarly situated — will be lost, chilled by the initiation of a pretextual deportation proceeding that is immune from judicial scrutiny for many years.

Amicus submits this brief with the written consent of the parties. The consents have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents are aliens living in the United States ("the targeted aliens") who have been singled out for deportation by the INS because of their controversial political beliefs and associations. Were the INS openly to threaten to deport aliens because of their First Amendment activity, extremely important First Amendment issues would be raised mandating timely judicial review.² Indeed, pre-enforcement review of a threatened

2. By "First Amendment activity" *amicus* means activity that objectively can be said to raise First Amendment concerns. The determination of whether the aliens have in fact engaged in First Amendment activity must be made in a judicial proceeding.

This Court declined to grant certiorari on the scope of the First Amendment protections enjoyed by aliens. For the purpose of considering the jurisdictional question before the Court, the parties must accept, as stated in the Complaint, that aliens living in the United States have full First Amendment rights. J.A. 47, 48, 54. The words of the

(Cont'd)

deportation is available under the statute at issue here, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). See 8 U.S.C. §§ 1252(g) and 1252(f) (Supp. II 1996) (Before the Attorney General has commenced proceedings against an alien, federal jurisdiction is not limited, except for 1252(f)'s possible restriction of pre-enforcement relief to declaratory relief only). In an apparent attempt to evade those important constitutional issues, and to postpone judicial review, the INS has disguised the deportation proceedings against the targeted aliens as "garden-variety" prosecutions for the violation of technical aspects of immigration laws having nothing to do with politics. But the INS has publicly conceded that these "garden variety" immigration proceedings would never have been commenced but for the protected political activities of the targeted aliens. J.A. 93-94. The deportation proceedings here are, therefore, nothing more than pretextual³ efforts to punish the targeted aliens for controversial political behavior.

(Cont'd)

First Amendment — "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble" — do not distinguish between citizens and others; indeed, the only reference to the intended beneficiaries of the Amendment is to the "people" who may peaceably assemble. Recognizing the textual mandate of inclusion, this Court has explicitly stated that "freedom of speech and of the press is accorded aliens residing in this country." *Bridges v. Wixon*, 326 U.S. 135, 148 (1945).

3. At least two types of pretextual deportation proceedings may exist. One form of pretextual proceeding involves "bad faith" allegations of immigration law violations that the INS does not believe to have actually occurred. A second type of pretextual proceeding involves plausible allegations that technical violations of law have occurred, but where the proceeding is not motivated by a desire to enforce the technical violations, but to use the proceeding as a device to punish the targets for something else, in this case the exercise of First Amendment activity. *Amicus* uses the term pretextual in the latter sense.

The Court of Appeals ruled that timely judicial review of the targeted aliens' claims that the INS sought to punish them because of their First Amendment activities was available in the district court. Pet. App. 15a. Absent such timely review, the Court of Appeals recognized that the INS would have *de facto* power to punish and deter activity protected by the First Amendment, without any possibility of judicial oversight for extended periods of time.

The INS argues, however, that by disguising the deportation proceedings as "garden variety" prosecutions having nothing to do with politics, it can escape timely judicial review of its attempt to use the administrative process as an *in terrorem* device to deter the targeted aliens (and those similarly situated) from engaging in protected controversial political activities. But the INS's attempt to shield its sophisticated exercise in political censorship from judicial review runs headlong into this Court's uniform recognition that efforts by law enforcement authorities to punish or deter First Amendment activity must, as a matter of First Amendment law, be subject to timely and effective judicial review.

The targeted aliens argue persuasively that unless district court jurisdiction is recognized, it will be impossible to secure judicial review of the government's decision to single them out for pretextual deportation proceedings as a punishment for First Amendment activity. The administrative hearing officer lacks statutory authority to develop a record regarding selective prosecution. Petitioner's Brief at 38 (hereinafter "Pet. B."); See also *Lopez-Telles v. INS*, 564 F.2d 1302, 1304 (9th Cir. 1977) ("The immigration judge is not empowered to review the wisdom of the INS in instituting the proceedings."). Yet under IIRIRA, the court of appeals, in its review of the aliens' case after a final order of deportation, would be tethered to this inadequate administrative record. See 8 U.S.C. § 1252(b)(4)(A) (Supp. II 1996).

Even if, however, a modicum of judicial review might be available at some date far in the future, *amicus* contends that our system of free expression requires *timely* judicial review of actions by law enforcement officials that are openly designed to punish and deter the exercise of First Amendment rights. Indeed, *amicus* knows of no case in which claims that the government commenced prosecutions or civil proceedings in order to punish or deter individuals engaged in protected First Amendment activity were denied timely judicial review.

The First Amendment rule could not be otherwise. This Court has repeatedly recognized that where fragile First Amendment rights are at stake, extended delay prior to judicial review of executive officials' alleged censorship gives the executive branch *de facto* power to determine the real-world meaning of the First Amendment. That is why this Court has held that a denial of First Amendment rights even for extremely short periods of time constitutes "irreparable injury" authorizing immediate injunctive relief against executive acts of censorship. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Whether the issue has been censorship of alleged indecent material by administrative agencies,⁴ seizure of First Amendment material by law enforcement officials,⁵ standardless executive permit and licensing systems for First Amendment activity,⁶ unduly

4. E.g., *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965).

5. E.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); See also *Heller v. New York*, 413 U.S. 483 (1973).

6. E.g., *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

vague statutes granting too much power to executive officials,⁷ or overbroad statutes inviting abuse by law enforcement officials,⁸ this Court has recognized that timely judicial review of executive action is critical to the continued enjoyment of First Amendment rights.

It would, therefore, constitute a dangerous departure from years of settled jurisprudence for this Court to permit law enforcement officials to punish persons for First Amendment activity without an opportunity for timely judicial review. Indeed, it would be a blueprint for executive censorship across the spectrum of First Amendment activity.

ARGUMENT

I.

THE COMMENCEMENT OF PRETEXTUAL DEPORTATION PROCEEDINGS AGAINST THE TARGETED ALIENS CONSTITUTES ADMINISTRATIVE ACTION DESIGNED TO PUNISH AND DETER ACTIVITY PROTECTED BY THE FIRST AMENDMENT.

If an INS official had telephoned each of the targeted aliens and threatened him with deportation for engaging in activity protected by the First Amendment, the targets would undoubtedly have been entitled to timely judicial review of the government's effort to intimidate them into political submission. See *Bantam Books v. Sullivan*, 372 U.S. 58 (1963)

7. E.g., *Smith v. Goguen*, 415 U.S. 566 (1974); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

8. E.g., *Reno v. American Civil Liberties Union*, __ U.S. __, 117 S. Ct. 2329 (1997); *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987).

(credible threats of prosecution for selling controversial books are subject to immediate judicial review). Indeed, such review is not precluded by IIRIRA. See 8 U.S.C. 1252(g) and (f). Instead of sending a threatening message by telephone, the INS sent a far more frightening message to any alien considering controversial political activity. The message is simple: engage in such political activity, and you will be subject to deportation for technical violations of the immigration laws that are tolerated when committed by those who remain silent or who support favored political causes.

Such a message has an obvious impact on an alien's willingness to engage in First Amendment activities. This Court has recognized that persons confronted with an overbroad or a vague statute that imposes criminal sanctions for violations are likely to steer clear of the prohibited zone, even if the deterred activities are fully protected by the First Amendment. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988). So, too, would vulnerable aliens confronted with the prospect of a retaliatory deportation proceeding steer clear of controversial political activities.

The punitive effect of this pretextual deportation proceeding on the aliens' First Amendment rights is demonstrated by contrasting such a proceeding with an ordinary, good faith deportation proceeding. In an ordinary deportation proceeding, the issues actually driving the prosecution can be addressed conclusively within the administrative process. INS hearing officers are authorized to handle these matters, with judicial review available at the end of the administrative proceeding. Where, however, the INS has targeted an alien for a pretextual deportation proceeding because of his political speech, the INS has conceded that a challenge to the pretextual prosecution cannot be raised in the deportation proceeding. Pet. B. at 38. The INS' concession is correct, since it would be

impossible for an INS hearing officer to sit in judgment over the motivations of his superiors. Without access to judicial review, a targeted alien will be forced to spend years defending himself against technical violations of the immigration statutes, while the real motivation for the prosecution — a desire to punish him for controversial political beliefs and associations — remains tantalizingly beyond the scope of the administrative proceeding.

During those years, the targeted alien suffers continuing harm, as do all similarly situated members of the alien community. The harm takes many forms. The most immediately apparent is the psychological and monetary cost of defending oneself in a lengthy deportation proceeding that should never have taken place. But an alien's injury is not merely that he is forced to endure several year long trial, and the accompanying inconvenience, expense, anxiety, and, if detained, loss of liberty. There is an ongoing injury to the alien's First Amendment rights *during* the trial. Quite simply, the alien will be fearful of engaging in controversial political activities during the proceeding. He will refrain from political activity and speech, because the INS can, and most likely will, take into account an alien's continuing political activity in determining how it treats the alien during the proceedings, and in deciding whether to continue a lengthy proceeding against him. *See In re Asbestos School Litigation*, 46 F.3d 1284, 1295 (3rd Cir. 1994) (permitting interlocutory review of a district court's finding that defendant Pfizer, Inc.'s association with a business group subjected it to a civil conspiracy claim in an asbestos liability lawsuit, because if Pfizer had to wait until the close of proceedings to obtain appellate review of this finding, it would be chilled from associating with the business association throughout the long litigation. "The harm in the present case goes well beyond the mere expense and inconvenience of litigation. Failure to issue a writ in this case would subject Pfizer to a continuing impairment of its First Amendment freedoms.")

Further, and perhaps most importantly, the fact of the trial constitutes an ongoing injury to the First Amendment rights of the many other aliens who may also be in default of technical provisions of the immigration laws. These aliens would observe the plight of those on trial, and conclude that they also dare not engage in controversial political activity, lest they also be met with a pretextual deportation proceeding. The trial, thus, has a ripple effect, starting with the accused and dispersing throughout their political community. Without a timely challenge in the courts, the perception of the outside world is that certain speakers may be subject to deportation proceedings, and confronted with a final self-executing order of deportation, because of the content of their speech. The possibility that the speakers may be able to challenge the order years later matters not; at that point the damage is done. Other aliens, learning from example, will remain silent.

In a real sense, therefore, the very commencement of a pretextual deportation proceeding, not merely its eventual outcome on the merits, is a fully completed action by law enforcement officials that intentionally punishes and deters the exercise of First Amendment activity. As such, as the Court of Appeals understood, and, as *amicus* contends in Point II, it must be subject to timely judicial review.

II.

THE FIRST AMENDMENT REQUIRES TIMELY ACCESS TO JUDICIAL REVIEW WHENEVER LAW ENFORCEMENT OFFICIALS ACT TO PUNISH AND DETER PROTECTED FIRST AMENDMENT ACTIVITY.

A commitment to a robust First Amendment entails two parallel lines of protection. First, the Court has struggled to define the substantive contours of First Amendment protection,

developing complex and elaborate formulae to define the sphere of protected First Amendment activity. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989); *United States v. Eichman*, 496 U.S. 310 (1990); *Cohen v. California*, 403 U.S. 15 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Equally importantly, the Court has recognized that the substantive definition of First Amendment rights must be accompanied by a set of procedural protections designed to assure that a commitment to free speech is not eroded by procedures that ensure free speech protection in theory, but not in practice. Accordingly, the Court has enunciated at least four areas of First Amendment procedural protection: (1) a ban on most prior restraints, especially prior restraints issued by law enforcement officials; (2) a refusal to countenance unduly vague or overbroad statutes, especially in settings involving regulation of speech; (3) a rigorous equal access principle that requires all persons to be treated equally whenever government purports to regulate speech; and (4) a strict requirement of procedural fairness in any setting where officials seek to regulate speech.

The thread that unites all four areas of procedural protection is this Court's recognition that institutional devices vesting law enforcement officials with the *de facto* ability to decide who may speak and who must remain silent pose an intolerable risk to a system of free expression. Accordingly, such devices must be subject to prompt judicial review.

The virtually absolute ban on prior restraints issued by law enforcement officials is a classic recognition that the executive branch may never be vested with unilateral power to suppress speech. In *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), for example, a government commission distributed lists of objectionable books, informed bookstores of its intent to recommend obscenity prosecutions, and distributed the lists to the local police. The Court condemned the system as an

administrative prior restraint because it shifted *de facto* power over speech from courts to law enforcement officials. Similarly, in *Freedman v. Maryland*, 380 U.S. 51 (1965), the Court condemned an administrative licensing scheme for motion pictures because it had two fatal errors: it was too long (4-6 months) and it vested too much power in the hands of the executive.

Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court — part of an independent branch of government — to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

380 U.S. at 57-58. See also *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (unreviewable administrative decision to ban the musical "Hair" from municipal auditorium violates First Amendment); *FW/PBS Inc. v. Dallas*, 493 U.S. 215, 228 (1990) (broad licensing scheme upheld because there was "the possibility of prompt judicial review in the event that the license is erroneously denied."). Similarly, when permits are required for marches or demonstrations there must be prompt judicial review of executive officials' decisions on such permits, because of the inherent possibility that the executive may deny march permits based on their disagreement with the views sought to be expressed. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring) ("[T]iming is of the essence in politics. It is almost impossible to predict the political future; and when an event occurs, it is often necessary to have one's voice heard promptly if it is to be considered at all.").

Overbroad and vague statutes raise similar concerns for two reasons. First, because the statutes cast so wide a net, they

invite law enforcement officials to use improper criteria in choosing which of the persons "caught" by the statute shall be prosecuted. The officials may decide whom to prosecute by evaluating a transgressor's speech, manner, or looks. See *City of Lakewood v. Plain Dealer*, 486 U.S. at 758. Second, because it is not clear on the face of the statute what speech is restrained and what is not, many people will engage in self-censorship, for fear of stepping over an ill-defined line. *Id.* at 757-58; *Reno v. American Civil Liberties Union*, ___ U.S. ___, 117 S. Ct. 2329, 2344-45. Prompt judicial review combats both concerns. Executive and administrative officials will be far less likely to engage in discriminatory prosecutions if they know their actions will be quickly reviewed by an independent judiciary. Similarly, if the public may bring timely challenges to overbroad or vague statutes, they can obtain either a narrowing construction or a ruling of unconstitutionality, allowing them again to speak freely after a short period of time. *City of Lakewood v. Plain Dealer*, 486 U.S. at 759.

The Court's rigorous requirement of equal treatment of all putative speakers attempting to speak in public places also demonstrates a concern with the exercise of undue power over speech by administrative officials. *Chicago Police Department v. Mosely*, 408 U.S. 92 (1972); see also *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829-830 (1995); *Carey v. Brown*, 100 S. Ct. 455, 461-62, 471 (1980). The equal treatment principle is self-consciously designed to eliminate unreviewable discretion by law enforcement and other administrative officials over who may speak in public forums and who must remain silent. *Rosenberger*, 515 U.S. at 844-45.

Finally, the First Amendment "due process" cases, exemplified by *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971), are explicit efforts to assure effective judicial control

over law enforcement decisions to suppress colorably protected speech. In *Marcus*, the Court invalidated a procedure that allowed law enforcement officers to seize allegedly obscene materials without judicial scrutiny. In *Thirty-Seven Photographs*, the Court construed a statute providing for the seizure of allegedly obscene materials coming into the United States to require judicial review of such seizure within 14 days, and a final decision by the district court within 60 days. In both cases, the Court determined that timely judicial review must be available to those whose speech the government is attempting to restrict.

Amicus does not contend that the INS's deportation proceedings against the targeted activists precisely fit into any of these categories, but therein lies its danger. The government is free to argue, as it has, that because this is not a prior restraint (or an overbroad statute, or an attempt to seize protected material, etc.), the targeted aliens have no right to a prompt judicial forum to air their First Amendment claims. Pet B. at 42, n.18. *Amicus* urges this Court to look beyond the formal categories that have thus far been established and to recognize that the effects of the INS's action here are identical to the cases described above. The effect of a prior restraint is to chill speech by those who do not wish to cross the line marked in the sand and subject themselves to a criminal proceeding. The effect of the deportation proceeding here is the same: aliens will not engage in political speech. The effect of overbroad or vague statutes is to allow law enforcement to selectively enforce them against those whose politics displease them. The effect of delayed judicial review here is the same. The effect of treating people differently in terms of access to speak in public forums is to chill the speech of those who wish to continue to use such public facilities. The effect of the INS proceeding is the same: aliens will not support controversial activity in order

to continue to enjoy the benefits of residence in the United States (except, of course, for the benefit of free speech). The effect of a lack of procedural fairness when officials seek to seize books or other tangible speech because of its content is to stop people from creating work of "questionable" content. The effect of the INS proceeding is the same: aliens will stop supporting political causes that are "questionable" to the prevailing government.

Indeed, what the INS is seeking here is this Court's approval of an extended "dead space" between law enforcement activity designed to punish and deter First Amendment rights and judicial review of such action. As *amicus* has detailed, the Court has consistently refused to permit the existence of such "dead space." If the government is successful in establishing judicially unreviewable law enforcement power over controversial speech by aliens, the use of the same technique to insulate executive assaults on other forms of controversial speech is fair game. Congress could insulate the Federal Election Commission from effective judicial review if it commenced pretextual proceedings against disfavored candidates, by forbidding judicial review until after a final FEC determination. Congress could insulate the Federal Communications Commission from judicial review if that agency commenced pretextual license revocation proceedings against broadcasters broadcasting messages in support of candidates of the "wrong" political party, by limiting judicial review to some time after the license had been revoked and the broadcaster was out of business.

The cases chosen by the INS to support its argument as to the constitutionality of delayed review are inapposite. The differences between the cases it cites and the case presented here demonstrate that the INS's action here is indeed

unprecedented. *Weinberger v. Salfi*, 422 U.S. 749 (1975) held that a class of widows was required to exhaust administrative remedies before gaining judicial review of their claim that Social Security Act provisions requiring them to have been married to their husband for at least nine months in order to collect survivors' benefits were unconstitutional. In *United States v. Hollywood Motor Car Co.*, 449 U.S. 263 (1982) the Court required a criminal defendant to go forward to trial without interlocutory appellate review after the district court denied his claim for vindictive prosecution based on the defendants' motion for a change of venue. Finally, *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232 (1980) held that a company who claimed that the FTC had filed antitrust charges against it without reason to believe that it had in fact violated FTC regulations could not get immediate judicial review after the FTC denied its motion to dismiss. None of these cases involve First Amendment rights in any context, much less the context of an executive action commenced to deter First Amendment activity. None raise the issue of irreparable harm from the suppression of the defendants speech, and the speech of the community, during the pendency of the administrative or criminal proceedings. In fact, *Standard Oil Co.* noted that "Socal does not contend that the issuance of the [FTC's] complaint had any [] legal or practical effect, except to impose upon Socal the burden of responding to the charges made against it." 449 U.S. at 242. In short, these cases do not deal with the central question raised here — whether Congress may preclude timely judicial review of administrative proceedings when such proceedings allegedly violate the targets' First Amendment rights — and thus they provide no support for the INS's position.

That the persons prosecuted here are aliens living in the United States, and the Congress has plenary power over such aliens, is no answer. Pet. B. at 39-40. As noted above, since

this Court did not grant certiorari on the question of whether aliens living in this country enjoy the same First Amendment rights as citizens, such aliens must be presumed to have such rights for the purpose of deciding the jurisdictional question. Further, Congress' plenary power over immigration is not absolute. While Art. I, § 8, cl. 4 of the Constitution gives Congress power over immigration, the grant does not occur without regard to the rest of the Constitution.

The plenary authority of Congress over aliens . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power.

INS v. Chadha, 462 U.S. 919, 941 (1983). Congress must be concerned with how its immigration enactments affect the First Amendment rights of aliens, and must chose a method of enforcing its enactments that does not offend these rights.

III.

THE COURT OF APPEALS WAS CORRECT IN READING THE RELEVANT STATUTORY LANGUAGE TO PERMIT TIMELY ACCESS TO JUDICIAL REVIEW.

The parties have offered competing constructions of IIRIRA that would permit judicial review of alleged violations of First Amendment rights. Yet only the one proffered by respondents and adopted by the Court of Appeals allows for *timely* review of such First Amendment claims. The construction proffered by the INS will not grant review until after the conclusion of those very events alleged to violate the aliens' First Amendment rights: namely, the bringing of deportation charges, and the undertaking of a lengthy and disruptive deportation hearing, followed by an order of

deportation, all because of the activists' speech in favor of a political cause disfavored by the government. Accordingly, the Court should adopt the construction adopted by the Court of Appeals. If it chooses not to do so, *amicus* contends that it must hold the statute unconstitutional.

The reading of the IIRIRA proposed by the INS involves grafting 28 U.S.C. § 2347(b)(3) onto IIRIRA's jurisdictional sections. Pet. B. at 44-49. 28 U.S.C. § 2347(b)(3) permits a court of appeals reviewing a final order of an administrative court to remand matters to the district court for a hearing when a hearing was not required in the administrative proceedings "as of law." The government's invocation of 28 U.S.C. § 2347(b)(3) to provide district court jurisdiction at the end of the day, however, results in precisely the deferred and cumbersome judicial review repeatedly condemned by the cases above. The targeted aliens would be forced to endure a lengthy pretextual deportation proceeding to its conclusion. Only then would the matter be reviewed by the Court of Appeals, where it would be remanded to a district court to develop a record on the selective prosecution claim. Such deferred review is simply not the timely and efficient review of First Amendment claims mandated by this Court's decisions.

The Court of Appeals, on the other hand, offers a plausible reading of IIRIRA that provides for judicial review and, if necessary, injunctive relief against the application of the deportation laws against a specific individual. Pet. App. 9a-15a. 8 U.S.C. § 1252(f) (Supp. II 1996) reads:

No court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operations of part IV of this subchapter [which includes the provisions on deportation at 8 U.S.C. § 1227 (Supp. II 1996)] *other than with respect to*

the application of such provisions to an individual alien against whom proceedings under such part have been initiated. (Emphasis added).

Where, as here, proceedings have been brought against an "individual alien," the literal language of this section vests federal courts with jurisdiction to engage in both factual and legal review of the aliens' claims of pretextual deportation. The INS, nonetheless, fears that reading 8 U.S.C. § 1252(f) to permit district courts to enjoin ongoing proceeding against an alien would allow this "limitation" on jurisdiction to swallow the rule of deferred judicial review of deportation proceedings. See 8 U.S.C. § 1252(b)(9) (Supp. II 1996). This fear ignores the Court of Appeals' explicit limitation on the use of 8 U.S.C. § 1252(f) to claims raising a constitutional question that cannot be addressed in the course of the deportation proceeding itself. Pet. App. 11a. ("Under subsection (f), individual aliens would appear to be able to seek judicial review of constitutional claims *such as those at issue here.*") (Emphasis added).

This jurisdictional controversy echoes a similar governmental attempt, thirty years ago, to silence dissent by commencing non-reviewable pretextual administrative proceedings designed to punish controversial exercises of First Amendment activity. As opposition mounted to the Vietnam War, mass anti-war demonstrations were held at Selective Service offices throughout the United States. In response to the demonstrations, which occasionally involved unprotected attempts to block access to induction centers, or refusals to carry draft cards, the Selective Service announced that anti-war demonstrators with otherwise valid draft deferments would be subject to reclassification to active duty eligibility as a punishment for interfering with the Selective Service Act. Since the Act did not grant federal courts jurisdiction over pre-

induction review of punitive draft re-classifications, the net effect of the Service's edict was to force anti-war demonstrators to choose between giving up their speech, or challenging the Service's action via a writ of habeas corpus after they had already been inducted into the Army.

Two lower courts, confronted with this combination of the Service's action to punish First Amendment activity and Congress' withdrawal of jurisdiction to exercise timely judicial review over the administrative proceedings, held that the courts nonetheless had jurisdiction to hear claims of First Amendment violations. *Wolff v. Selective Serv. System Local Bd. No. 16*, 372 F.2d 817, 826 (2d Cir. 1967); *National Student Ass'n v. Hershey*, 412 F.2d 1103 (D.C. Cir. 1969). In *Oestereich v. Selective Serv. System Local Bd. No. 11*, 393 U.S. 233, 242 (1968), the Supreme Court, aided by a courageous confession of error by then-Solicitor General Erwin Griswold, ruled that Congress simply could not have intended to strip the courts of power to review such lawless draft reclassifications. Accordingly, this Court read the seemingly absolute congressional language as containing an implied exception for federal jurisdiction needed to protect against lawless punitive reclassifications. 393 U.S. at 238.

As the Court of Appeals has demonstrated, a plausible reading of IIRIRA exists in this case that is far less heroic than the reading of the Selective Service Act adopted by this Court in *Oestereich*. Just as this Court used its power to construe Congress's jurisdictional provisions in *Oestereich* to permit jurisdiction required by the First Amendment, so a similar, far less difficult reading should be adopted in this case to preserve the timely access to judicial review that is a hallmark of the modern First Amendment.

CONCLUSION

For the reasons stated above, the decision below should be affirmed. In the alternative, this Court should hold unconstitutional that portion of IIRIRA that deprives an alien's claim of First Amendment violations in a deportation proceeding a timely judicial forum.

Respectfully submitted,

BURT NEUBORNE

Counsel of Record

E. JOSHUA ROSENKRANZ

MARTA NELSON

BRENNAN CENTER FOR JUSTICE

AT NEW YORK UNIVERSITY

SCHOOL OF LAW

Attorneys for Amicus Curiae

161 Avenue of the Americas

5th Floor

New York, New York 10013

(212) 998-6730

September 11, 1998